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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 452

222 East Chestnut Street Corporation, a corporation of Delaware,

Petitioner,

vs.

Lakefront Realty Corporation, a corporation of Illinois; Lake Shore Club of Chicago, a corporation of Illinois; Northwestern University, a corporation of Illinois; George L. Ramsey, individually and as Commissioner of Buildings of City of Chicago; City of Chicago, a municipal corporation of Illinois; Richard J. Daley, individually and as Mayor of City of Chicago,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and The Associate Justices of the Supreme Court of the United States:

222 East Chestnut Street Corporation, a corporation of Delaware, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on June 18, 1958. (The record from the

appeals court filed by petitioner, consists of (i) Appendix (printed) filed February 15, 1958, herein referred to as "**A.** ....". (ii) Motion (printed) of petitioner for leave to file Amendment to complaint, filed April 25, 1958, herein referred to as "**S.A. 1**, p. ....". (iii) Amendment (printed) to said Motion filed May 3, 1958, herein referred to as "**S.A. 2**, p. ....", (iv) Judgment entered June 18, 1958, and (v) Order denying petition for rehearing, filed July 17, 1958.)

(a) Reference to the reports of the opinions delivered in the courts below.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 256 F. 2d 513; copy of the opinion is appended in **Appendix A** hereto p. 1a. The district court did not deliver any opinion.

(b) Statement of the grounds on which the jurisdiction of this court is invoked.

(i) The judgment of the Court of Appeals was entered on June 18, 1958 (**Appendix B**, p. 8a and certified record.) (ii) A petition for rehearing was filed by petitioner; it was denied by an order entered July 17, 1958, (**Appendix C**, p. 9a, and certified record.) (iii) The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari, is Title 28, U.S.C. sec. 1254(1).

(c) The questions presented for review.

(Petitioner contends that the decision of the court of appeals on important questions of federal law is not only in conflict with the decisions of other courts of appeal but with the decisions of this court.)

(1) a) On a motion of defendants to dismiss, based on F.R.C.P. 12(b) (6), failure to state a claim for relief, is it proper for the district court to consider an affidavit or other "extra-pleading" matter, alleging an affirmative defense in bar? b) If on a motion to dismiss, it is not proper for the district court to consider an affidavit or other "extra-pleading" matter alleging an affirmative defense in bar, is it proper for the appeals court to affirm the district court order of dismissal, not on the grounds of lack of jurisdictional amount and *res judicata* set out therein, but on the ground of such affirmative defense which had not been considered by the district court?

(If questions a) and b) should be answered in the negative, the appeals court order of affirmance is in error.)

(2) Is it proper for the appeals court to treat a motion to dismiss as a motion for summary judgment and affirm the order of dismissal on the ground of absence of any issue of fact, when the record shows that: a) the district court did not consider the motion to dismiss as converted into one for summary judgment but decided the motion as a motion to dismiss; b) plaintiff had no notice before the entry of the dismissal order that the motion was to be converted into one for summary judgment and plaintiff was given no opportunity to file counter-affidavit; c) it appears from the affidavit of defendants' affirmative defense in bar that there are, or certainly may be, disputed questions of fact involved therein?

(3) If it were proper for the appeals court to consider the effect of the agency decision as an affirmative defense in bar, did that court have the power and the right to allow plaintiff's motion for leave to file an Amendment to Complaint setting up matters of fact tending to show that this agency decision was in violation

of the federal constitutional provision for due process and was otherwise erroneous, illegal and void, so that under such Amendment the appeals court could either consider such matters on the instant appeal or could vacate the judgment of the district court and direct that court to allow the Amendment to be filed?

(4) Where (i) the state statute (as amended in 1953) confers on a neighboring property owner, without showing of special damage, an unconditional substantive right to sue to prevent any violation of the zoning regulations; (ii) the authorized municipal officer has entered an order that the proposed structure would violate the applicable zoning regulations, and because thereof has denied respondents a building permit; (iii) respondents have not appealed from said order but, pursuant to the state statute, have applied to a municipal zoning board to allow a variation from the appeals regulations; (iv) the zoning board, after hearing, has entered a decision holding that the proposed structure is a "permitted use" in conformity with regulations and that a building permit should issue; (v) the general state administrative review act, (passed some years before in 1945) provides that any other statutory, equitable or common law mode of review of administrative decision shall no longer be employed; (vi) petitioner, pursuant to this act, applied for statutory administrative review of the board decision; (vii) the state supreme court, without any consideration of the merits, sustained respondents' objection that petitioner, *absent* showing of "special damages", lacked standing to bring statutory administrative review; (viii) petitioner then sued in the federal court for injunctive relief against the zoning violation; (ix) the court of appeals held that the zoning board decision was "final" and not subject to judicial review because the petitioner lacks "standing"

for statutory review and the state statute purportedly prohibits any other kind of review;

a) As a question of statutory construction, was the appeals court correct in holding that the general provision of the state administrative review act (adopted in 1945) prevailed over the amendment to 73-9 (adopted in 1953) conferring this statutory substantive right, or is not the correct construction that the 1953 amendment prevailed over the earlier 1945 general act and that the statutory substantive right, created by the amendment to 73-9 in 1953, was not subject to the provisions of the earlier administrative review act requiring special damage to give "standing" to sue?

b) As a question of federal constitutional law, would it not be a violation of the prohibition against deprivation of property without due process, to hold that this statutorily conferred substantive right to prevent zoning violations can be taken away *with "finality"* by an action of an administrative agency, without the right-holder having any recourse to judicial review, where: (i) the agency lacked jurisdiction to decide that the proposed use was a "permitted use" and to reverse the building commissioner, because the matter had come before the agency on an application and notice on a different issue, *viz.* an application for zoning variation; (ii) the agency was a biased tribunal in that one Hartnett, president of respondent club, was a member of the agency and participated actively in the hearings; (iii) the agency, after the closing of proofs, received and considered evidence presented by respondents, which petitioner had no opportunity to meet; (iv) the agency ruling that the structure was a "permitted use" was based on a misconception of law?

(d) The constitutional provisions, statutes, ordinances or regulations which the case involves.

The Constitutional Provision.

U. S. Constitution—Amendment XIV

"Section 1 . . .; nor shall any state deprive any person of life, liberty or property without due process of law; . . ."

The Statutes.

There are involved certain provisions of the Illinois Statutes (*referred to as Ill. Rev. St. 1957*). Ch. 24, Art. 73 is the enabling act under which municipalities are given power to zone; Art. 73-3 provides for a board of appeals; Art. 73-4 provides that "variations" from the zoning regulations may be allowed by the board under certain conditions provided for therein; Art. 73-5 provides for appeals to the board from decisions of the municipal officers; Art. 73-6.01 provides that all final administrative decisions of the board shall be subject to judicial review under the Administrative Review Act; Art. 73-9 (as amended in 1953) provides that the proper local authorities of any municipality, and "any owner or tenant of real property in the same contiguous zoning district," may institute any appropriate proceeding to prevent or abate a zoning violation. Ch. 110, sec. 264, *et seq.* is the state administrative review act adopted in 1945; sec. 264 (sec. 1 of the Act) contains Definitions; sec. 265 (sec. 2 of the Act) prescribes the Scope of the Act. The provisions of the above statutes are set out *verbatim* in **Appendix D** pp. 10a-17a hereto.

The Ordinances.

There are involved certain provisions of the Chicago Zoning Ordinance, passed December 3, 1942, as amended, Municipal Code of Chicago, Chapter 194A. These provisions are set out *verbatim* in **Appendix E** pp. 18a-25a hereto.

(e) Statement of the Case.

This is a complaint (**A.** 3-24) by petitioner to enjoin respondents from erecting a three and four story split-level garage structure which petitioner alleges will be in violation of several of the applicable zoning regulations. Petitioner owns and operates a 19 story, 46 apartment building on E. Chestnut Street in Chicago having a value in excess of $600,000; respondents' property, being the proposed garage structure, will have a value in excess of $700,000. Petitioner's parcel and respondents' parcel are situated on the same street, E. Chestnut Street, with their closest points 293 feet apart; the two parcels are in the same "contiguous zoning district" as defined and limited by the applicable zoning regulations (**A.** 7-8). Petitioner's complaint (**A.** 9-10) alleges that respondents' proposed garage structure will be in violation of the applicable zoning regulations in four respects: (1) the regulations prohibit the erection of the proposed garage structure on respondents' parcel; (2) the regulations prohibit the erection on the site in question of a structure having an area in excess of 8,836 square feet (being one-half of the 17,672 square feet ground area) whereas, the proposed structure will occupy the entire 17,672 square feet area; (3) the regulations prohibit the erection of a structure that does not have a 12 foot set-back from E. Chestnut Street, whereas the proposed structure will extend to the street line; (4) the regulations prohibit the erection of a structure that does not have a 20 foot rear line set-back on the south whereas the proposed structure will extend to the rear line. After these averments, the complaint pleads the state statute (**A.** 10-11) Ill. Rev. St. (1957) Ch. 24, 73-9 (as amended in 1953) (**Appendix D**) conferring on any property owner in the same contiguous zoning district, the right to sue to prevent a zoning violation, and prays for a permanent in-

junction against the violation and for an allowance of attorney's fees ($25,000.00 is prayed) as authorized by this statute. Maps of respondents' parcel are attached to the complaint as Annex A (A. 15) and Annex B (A. 17).

Respondents did not file a responsive pleading. Instead, they filed a Motion to Dismiss Complaint and Action (A. 24-49) averring (A. 24-26): 1. The Court lacks jurisdiction of the subject matter because, A. The matter does not involve a case or controversy within the jurisdictional limits of the U. S. Constitution, B. The matter does not involve a controversy exceeding the sum or value of $3,000 exclusive of interest and costs; 2. Plaintiff is barred by *res judicata*, the cause of action having been determined adversely to plaintiff in an action in the state courts; 3. Plaintiff is estopped by judgment or verdict; 4. The state statute on which plaintiff relies does not grant to plaintiff a right to bring the action.

Attached to the Motion to Dismiss and made a part thereof is the Affidavit of Marshall Keig (A. 26-34) to which are attached Annexes A (A. 35-43), B (A. 44-46), C (A. 47-48), and D (A. 48-49). The following allegations of fact appear therefrom: (i) Respondent Lakefront Realty prior to September 7, 1955, filed with the Commissioner of Buildings of Chicago, its application for a building permit for the erection of the proposed garage structure; (ii) The Commissioner of Buildings rendered a decision dated September 7, 1955 as follows (A. 35): "Application not approved. Proposed improvement does not conform with requirements of zoning ordinance"; (iii) On September 9, 1955, Lakefront Realty filed with the Board of Appeals of Chicago an "Application to vary the requirements of the zoning ordinance" to permit the erection of a four-story brick garage for the storage of pri-

vate passenger automobiles of adjacent private club "which will exceed by 8,836 square feet, the 8,836 square feet permitted and whose front street wall will be on the lot line instead of set back 12 feet" (A. 35); the application was docketed as Case No. 524-55-Z; (iv) Notice of public hearing was published in a local newspaper on October 8, 1955; public hearings were held on October 25, and November 1, 1955 at which respondents introduced evidence and at which petitioner participated and cross-examined witnesses; (v) At the hearing on November 1, 1955, the proofs were closed and the matter taken under advisement; (vi) On December 6, 1955, the board entered its decision (Annex A to Keig affidavit) that the refusal of the Commissioner to issue the building permit was based on his erroneous interpretation of the zoning ordinance and ordering the Commissioner to issue the permit[1]; (vii) Subsequently petitioner filed suit in the

[1] The board decision after holding that Lakefront Realty has a legal right under the zoning regulations to erect the proposed structure goes on to provide (A. 43) "IN THE ALTERNATIVE, the Board finds that if no legal right exists and the use of the premises for a garage facility is the subject of a variation," that a variation be allowed from the zoning regulations to permit the erection of a garage structure "which will exceed by 8836 sq. ft. the 8836 sq. ft. area permitted and whose front street wall will be on the lot line instead of set back 12 feet and whose west wall will extend to the west line of said lot 51, and whose south wall will be located 14 feet, 1½ inches south of the south line of said lots 49, 50 and 51," etc. Respondents subsequently abandoned the "variation" theory and put all their reliance on the "permitted use" theory. See state superior court order (Keig, Annex B, p. 3, A. 46):

"5. That the finding, recital and reasoning of the Board of Appeals in said matter granting said Lakefront Realty Corporation a variation was not essential to the validity of the decision of the Board of Appeals finding that the proposed use was a permitted use and may be disregarded on appeal as surplusage."

lower state court for statutory administrative review of the board decision, which court entered judgment that the legal rights, duties or privileges of petitioner were not adversely affected by the board decision, that by the proceedings petitioner had not been deprived of its property without due process of law in violation of the state and federal constitutional provision, that petitioner's complaint be dismissed; (viii) From this judgment of the lower state court, petitioner appealed to the state supreme court which (without any consideration of the merits), decided that petitioner, absent showing of special damages, had no "standing" to bring statutory administrative review, and affirmed.

It appears therefore, that there has never been any judicial review on the merits or legality of the zoning board decision.

The instant suit came before the district court on the Complaint, the Motion to Dismiss and the briefs of counsel. Subsequently, the district court, without hearing oral argument, without notice to counsel, and without delivering any opinion, entered an order[2] sustaining the Motion to Dismiss on two grounds, *viz.*, lack of sufficient averments as to jurisdiction and *res judicata*. The order made no reference to the zoning board decision.

On appeal, petitioner contended in its briefs that on a Motion to Dismiss the issue was the sufficiency of the com-

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[2] The order reads (A. 2)

"It appears to the Court that plaintiff has failed to support with sufficient factual allegations, its conclusory statements that this court has jurisdiction. It further appears that the matter of which complaint is made has been decided adversely to plaintiff and that plaintiff is barred from maintaining its action by res judicata.

It is hereby ordered that defendant's Motion to Dismiss the complaint and action be allowed and said complaint and action are dismissed."

plaint as a complaint, and that "extra-pleading" matters such as the zoning board decision, were not open for consideration. Petitioner argued that the two grounds set up in the district court order, *viz.*, lack of sufficient allegation as to jurisdiction and *res judicata*, were without merit. At the oral argument before the appeals court, it appeared that the appeals judges, while agreeing with petitioner that the grounds for dismissal given in the district court order were not well founded, nevertheless were inclined to affirm the district court order on *another* ground, not set out in the district court order, namely that the zoning board decision was a defense in bar to petitioner's complaint because the board decision with "finality" converted what would otherwise have been a zoning violation, into a *non-violation*.

In giving consideration to this affidavit, the appeals judges were disregarding what petitioner contends is the clear meaning of F.R.C.P. 12 (b) that "extra-pleading" matters are not available on a Motion to Dismiss. Under these circumstances and without in any way waiving its point that "extra-pleading" matters were not open to consideration (either by the district court or the appeals court) petitioner, subsequently to the oral argument but while the cause was still under advisement, filed (on April 25, 1958) a Motion (**S.A. 1**) subsequently amended (on May 3, 1958) (**S.A. 2**) wherein petitioner moved the appeals court in the alternative (**S.A. 1**, pp. 1-3, **S.A. 2**, pp. 1-2) namely that (i) a certain Motion and the Amendment to Complaint (**S.A. 1**, pp. 3-12) (therewith presented) be taken and considered with the appeal with leave to defendants-appellees to file answer thereto, and for (a) an order reversing the judgment of the court below, or (b) an order vacating the judgment of the court below with direction to allow plaintiff to file said

Amendment or, (ii) for such other order as will allow this matter to be disposed of on its merits. (**S.A. 2, pp. 1-2**).

The tendered Amendment (**S.A. 1, pp. 3-12**) prayed for judicial review and voiding of the board decision, alleging that said decision, in violation of the provisions of the United States Constitution and the Illinois Constitution, deprived petitioner without due process of law of petitioner's statutorily conferred substantive right to prevent zoning violations, and was erroneous, illegal and void in the following respects: (a) One Hartnett, president of respondent Club was also a member of the zoning board and actively participated in the hearings before the board on respondents' application for zoning variation, although in the official record of the subsequent decision of the board he is shown as not voting; (b) Subsequently to the closing of proofs, the board, outside the presence of petitioner, received and considered evidence then presented by respondents as to which petitioner had no opportunity to inspect, consider, cross examine witnesses, or offer evidence in explanation or rebuttal; (c) The board had no jurisdiction to enter the order reversing the building commissioner because the matter came before the board on respondents' application for zoning "variation" (as will appear from the application, the public notice, and the board proceedings) and the matter did not come before the board on appeal from the building commissioner's ruling denying the permit; the board's jurisdiction was therefore limited to the issue of the zoning "variation" and it had no jurisdiction to enter a decision that the building commissioner's action was erroneous and that the structure would be a "permitted use"; (d) Even if the board had jurisdiction to review the building commissioner's ruling in denying a building per-

mit, the board decision reversing the commissioner's ruling was erroneous and contrary to law because under a proper construction of the zoning regulations, (i) a garage is prohibited here, and also, the regulations prohibit (ii) a structure having an area in excess of 8836 square feet, (iii) a structure within the front (north) 12 feet set-back (iv) a structure within the rear (south) 20 feet set-back.

As part of the tendered Amendment, petitioner submitted Exhibits A-I to A-IX. Exhibit A-V (**S.A. 1**, pp. 21-22) consists of excerpts from the Transcript of Proceedings before the board showing that during the board hearings, Hartnett, a member of the board, and at the same time *president* of respondent club, actively participated in the hearings and interrogated one Stanton (a witness for respondents) whether he, Stanton, had not previously expressed an opinion that if the structure were set back to comply with the ordinance, it would have to go 12 stories in height. Exhibit A-VII (**S.A. 1**, pp. 24-26) is a circular letter to Lake Shore Club members from Hartnett as club president, dated November 23, 1955 (at a time when the matter was under advisement by the board) in which Hartnett states "It is hoped that the zoning board will approve our plan for the garage." Exhibit A-VIII (**S.A. 1**, pp. 27-29) contains excerpts from the Rules of the Board, Article III thereof providing for a differentiation in numbering between applications for a zoning *variation* (to be designated by letter **Z**) and applications for *appeal* from decision of building commissioner (to be designated by letter **A**). (**S.A. 1**, pp. 17-18). Ex. A-I (The Application for Variation, **S.A. 1**, pp. 13-16) Ex. A-II (The Publication Notice, **S.A. 1**, pp. 17-18) Ex. A-III (Notice to Property Owners, (**S.A. 1**, pp. 18-20) Ex. A-IV (Notice to Applicant, **S.A. 1**, p. 20) all refer to case No. 524-55-Z and show that this

matter was heard by the board as an application for a zoning *variation* and not as an appeal from the building commissioner.

Thereafter, respondents filed suggestions in opposition to the above Motion. These suggestions did not traverse any of the fact allegations or Exhibits set out in the proposed Amendment but alleged generally that all these matters had been urged by petitioner in the state administrative review suit, and were therefore *res judicata*. The appeals court on June 18, 1958 delivered an opinion, **Appendix A** hereto, in which the court denied petitioner's Motion for leave to file Amendment, on the ground that petitioner had knowledge of all the matters in the Amendment when petitioner filed its original complaint. The appeals opinion gave no consideration to the matters set up in the Amendment as to lack of due process, biased tribunal, consideration of matters outside the record, lack of jurisdiction to hear an appeal, etc. The opinion concluded that since the zoning board had decided the proposed structure was a "permitted use", and since the state supreme court had held petitioner lacked "standing" to file statutory administrative review, that petitioner had no remedy; that the board decision was "final" and not subject to judicial review; and that the order of dismissal here must be affirmed for this reason, although the district court may have relied on other reasons.

The basis for federal jurisdiction in the district court was diversity of citizenship and the existence of an amount in controversy in excess of $3,000, exclusive of interest and costs.

ARGUMENT.

1. The appeals opinion was in error in giving consideration on a motion to strike complaint, to matters outside the pleading such as the alleged affirmative defense in bar of the agency decision; consideration of such extra-pleading matters is forbidden by F.R.C.P. 12(b) (as amended in 1946).

The Rules provide (8(a)) that the complaint is to contain . . . "(2) A short and plain statement of the claim showing that the pleader is entitled to relief." Affirmative defenses are to be set forth affirmatively (9(c)): "In pleading . . . a party shall set forth affirmatively accord and satisfaction . . ., estoppel, . . . res judicata, . . . and any other matter constituting an avoidance or affirmative defense." Rule 12(b) provides that every defense "shall be asserted in the responsive pleading thereto if one is required" except that the following defenses may, at the option of the pleader, be made by motion: ". . . (6) failure to state a claim upon which relief can be granted."

Prior to the 1946 amendment (adopted December 27, 1946, effective March 19, 1948) there was a division of authority in the different circuits on permitting affidavits to be used in support of defense (6), as a result whereof the Advisory Committee and this court "resolved the confusion," (to quote Moore's Federal Practice, 2d Edition, Vol. 2, pp. 2255 *et seq.*) by the addition of the following sentence to Rule 12(b):

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary

> judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material* made pertinent to such a motion by Rule 56." (emphasis supplied)

The author continues (p. 2256) by pointing out that such a presentation of extraneous matter requires the trial court to make an election: (1) he may disregard the extraneous matter and consider and dispose of the motion as a *motion to dismiss,* in which case plaintiff has no right to file any opposing affidavit because defendant's affidavit is not available for consideration, or (2) he may *convert* the motion into one for *summary judgment,* thereby making defendant's affidavit available for consideration, but in such case, the plaintiff *"shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."* The author (p. 2256) footnote 23, quotes from the Advisory Committee Note, section 1201(7) *supra,*

> "It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavit and extraneous proofs to *avoid taking a party by surprise* through the conversion of the motion into a motion for summary judgment." (emphasis supplied)

2. It was error for the district court to sustain respondents' motion to dismiss.

(a) Respondents did not contend that the complaint here does not state a good cause of action.

The complaint alleges that petitioner's parcel and respondents' parcel are located in the same contiguous zoning district; that the applicable zoning regulations (par. 14, A.9-10): (i) prohibit the erecting of the proposed garage structure on the site in question; (ii) prohibit a

structure having an area in excess of 8,836 square feet (being one-half of 17,672 square feet ground area); (iii) prohibit a structure within the front (north) 12 feet of the parcel; (iv) prohibit a structure within the rear (south) 20 feet of the parcel; that respondents are about to build in violation of these prohibitions; that the state statute 73-9 (as amended in 1953) has conferred a right on petitioner as a qualified property owner to sue to prevent such violations and, if successful, to recover attorney's fees (par. 16, A.10-11), that petitioner's damage will be in excess of $3,000, its attorney's fees will be $25,000 (A.12); that there is diversity of citizenship and an amount in controversy in excess of $3,000; the prayer is for declaratory judgment, permanent injunction and allowance of attorney's fees. Attached to the complaint are maps, Annex A and Annex B, showing the property involved, and excerpts from the zoning regulations, Annex C. Respondents make no contention but that the complaint *qua* complaint, does not state a claim for relief.

> (b) On a motion to dismiss a complaint for defense "(6) failure to state a claim upon which relief can be granted" (F.R.C.P. 12(b)), the complaint must be judged on its face, and affidavits and other extraneous matters setting up an affirmative defense in bar are not open for the court's consideration.

The appeals opinion holds that the zoning board decision allowing the structure as a "permitted use" (and set up as an affirmative defense in bar in respondents' supporting affidavit) is available for consideration on the motion to dismiss. The opinion overlooks that the sufficiency of the complaint must be judged on the complaint, *qua* complaint, and that an affidavit setting up an affirmative defense is

not open to consideration. The holding of the opinion is thereby in conflict with the policy of this court as reflected in the 1946 amendment to 12(b).

(c) The zoning board decision set up in respondents' affidavit was an affirmative defense in bar and was not open to consideration on the Motion to Dismiss.

The complaint pleaded the applicable zoning regulations and the threatened violations. Respondents' affidavit admits the regulations as pleaded, and that because of the violations of the area and front line setback regulations, the building commissioner denied respondents a building permit; but the affidavit then goes on, in confession and avoidance, to allege that subsequently thereto the zoning board entered a decision holding that the structure was a "permitted use" in conformity with the regulations and ordering a building permit to issue. Obviously this was an affirmative defense and respondents should have set it up by answer, not by motion to dismiss; any other holding is in disregard of the plain language of the 1946 amendment to 12(b).

3. The order of the district court cannot be sustained on the basis of a motion for summary judgment.

As noted, Rule 12(b) as amended in 1946, now provides that if on a motion to dismiss for (6) failure to state a cause of action, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, . . ." However, the district court's order here cannot be sustained on that ground because in order for the motion to be treated as one for summary judgment, it is necessary under the amendment to 12(b) that the *district court so elect*, and that the adverse parties

"be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 6(d) requires at least 5 days notice of the time of hearing a written motion; no such notice was given here. Rule 56(c) requires that a motion for summary judgment be served at least 10 days before the time fixed for hearing; no such notice was served here. There is nothing in the record here that the district court ever elected to treat this motion as one for summary judgment, or, much less, that petitioner was notified of such election and given an opportunity to file counter-affidavit. In fact, the district court's order explicitly states that the court was passing *on the motion to dismiss* (A. 2).

Sardo v. *McGrath* (D.C. Cir. 1952), 196 F. 2d 20, 23

> "(6) We think the emphasis in summary judgment practice has been, and must continue to be, on actual notice. This is made clear not only by Rule 56 itself but also by Rule 12(b), which expressly provides that when extra-pleading matters are presented, 'all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' Without such notice that allegations of fact are being made for the record, there is no real opportunity to create the 'genuine issue of material fact' which can stave off summary judgment." Judgment reversed.

Bowdidge v. *Lehmann* (6 Cir. 1958), 252 F. 2d 366,

> (pp. 368-369) "However, Rule 56(c) provides that a motion for summary judgment requires service 'at least ten days before the time fixed for hearing'. We think the spirit of the rule requires the same notice and hearing where this court contemplates summary dismissal on its own motion. Since attorney for appellant was given neither notice nor opportunity to be heard upon the question of summary dismissal the judgment was erroneous." Judgment reversed.

Herron v. *Herron* (5th Cir. 1958) 255 F. 2d 589, held that it was reversible error for district court to allow defendant to raise defense of statute of limitations on motion which court treated as motion to dismiss and not as motion for summary judgment, since (1) it had been necessary to go outside of pleadings to prove application of the statute, (2) object of motion had been to try the main issue in case and effect of dismissal had been a decision on merits, and (3) complainant had had no notice of hearing and no opportunity to meet the issues. Judgment for defendant reversed and remanded. The court said:

> (p. 593) "It is clear that Rule 8(c) requires affirmative defenses to be pleaded, in order to prevent surprise. There is general agreement also, under Rule 9(f), that even the defenses of limitations or laches may be asserted by motion to dismiss for failure to state a claim—provided that the complaint shows affirmatively that the claim is barred." citing cases and texts.
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> • • •
>
> "The 1946 amendment to Rule 12(b) requires a motion to dismiss to be treated as a motion for summary judgment, if the movant goes outside the pleadings to prove his affirmative defense. 'In short, the motion to dismiss is thereby converted into a motion for summary judgment.'" (citing authorities)

The court concluded:

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> (p. 594) "The rules safeguard a complainant from surprise. Rule 56 requires that the motion for a summary judgment be served 'at least 10 days before the time fixed for the hearing'. Rule 6(d) requires five days. Under Rule 56 'the pleadings, depositions, and admissions on file, with the affidavits, if any, [must] show that there is no genuine issue as to any

material fact'. The amendment to Rule 12(b) provides that if matters outside the pleadings are to be considered and the motion converted to one for summary judgment, 'all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56' ".

• • •

"In going into the disputed facts and in dismissing the suit, the trial judge went beyond the scope of his authority as defined in Rules 12(b) and 56.

The solid justice embedded in these two rules is well illustrated in the instant case. There may or may not have been a trust. But the complainant was entitled to a fair shake at proving the existence of a trust. Instead, without notice, without an opportunity to produce witnesses or to examine books and records of obvious bearing on the issue, without realizing what was happening to him, it happened: the case was disposed of on the merits. Rules 12(b) and 56 are to prevent just such an oddity. Complainant never had his day in court."

The court's language, *mutatis mutandis*, is an apt description of the plight of petitioner here. In the instant case the appeals court opinion abstains from any reference to the point.

The appeals court opinion here in sustaining the district court order as a proper exercise of the summary judgment power, is in conflict with these three decisions from the D.C. the 5th and 6th Circuits. See also *Hormel* v. *Helvering*, (1941) 312 U.S. 552, 556; *Publicity Building Realty Corp* v. *Hannegan* (8 Cir. 1943) 139 F. 2d 583, 587, that a reviewing court should not decide a case on a point not raised below.

4. (a) The district court assigned two grounds in support of his order sustaining the motion to dismiss, namely 1st, lack of jurisdiction, 2nd, res judicata. (b) Neither of these grounds was a proper basis here for a motion to dismiss.

The grounds of the district court order appear from the order quoted above (p. 10, footnote 2 (**A**2)). *1st*, **lack of jurisdictional amount was not a basis for dismissal.** The complaint alleged that petitioner's property had a gross annual rental in excess of $125,000 and a value in excess of $600,000 (**A**3, **A**4), that respondents' property being the proposed garage, would have a value in excess of $700,000 (**A**3), that petitioner's damage would exceed the sum of $3000 (**A**3), that petitioner under the statute was entitled to a reasonable attorney's fee, alleged to be $25,000 (**A**12). The damage to respondents, if petitioner were to prevail, would be substantial, far in excess of the statutory $3,000.

In a suit to prevent a defendant from erecting a described structure, the court in determining whether matter in controversy exists in the jurisdictional amount, will not only consider the value of plaintiff's right and the damage to plaintiff if the relief prayed *be not* granted, but will also consider the value of defendant's proposed structure and the damage to defendant if the relief prayed *be* granted; if either of these damages, whether to plaintiff or to defendant, is in the jurisdictional amount, that is sufficient to confer jurisdiction. U.S.C. Title 28, sec. 1332(a); *American Smelting & Refining Co.* v. *Godfrey*, 158 Fed. 225, 228-229, 8 Cir. 1907 (cert. den. 207 U.S. 597); *Fidler* v. *Roberts*, 41 F. 2d 305, 306, 7 Cir. 1930; *Rouzio* v. *Denver & R.G. W.R. Co.*, 116 F. 2d 604, 10 Cir. 1940.

But there is more: Under the state statute, Ch. 24, 73-9 (**Appendix D** 14a) plaintiff, if successful, is entitled to re-

cover a reasonable attorney's fee, which plaintiff (comp. par. 17(c), A12) alleges would be $25,000. Such right to attorney's fees is a substantive right which alone may sufficiently constitute the jurisdictional amount in controversy. *Missouri State Life Insurance Company* v. *Jones* (1933), 290 U.S. 199, 200-201, 201-202; *People of Sioux County, Nebraska* v. *National Surety Company,* 276 U.S. 238, 241-242, 243-244 (1928).

2d **Res judicata was not a proper basis for dismissal.** The state supreme court in *222 East Chestnut Street Corporation* v. *Board of Appeals* (1956) 10 Ill. 2d 130, decided that petitioner, absent showing of special damage lacked "standing" to bring review under the state administrative review statute (Ill. Rev. St. 1957, Ch. 110, sec. 264) and on that ground alone, without any consideration of the merits, affirmed the lower state court judgment which had dismissed petitioner's suit for state court administrative review. This holding of the state supreme court of petitioner's lack of standing to appeal, necessarily decided that petitioner lacked standing to bring the suit at all and the court so held. It is settled law that a decision holding that a party has misconceived his remedy (but not passing on the merits) is no bar to a second suit by that party for a proper remedy: *Hughes* v. *United States,* 71 U.S. (4 Wall.) 232 (1866); *Barnsdall* v. *Waltemeyer,* 142 Fed. 415 (8 Cir. 1905); *Bistline* v. *United States,* 229 Fed. 546, 549 (9 Cir. 1916); *Orminski* v. *Hyland Electrical Supply Company,* 326 Ill. App. 392, 395-397 (1945); 30 Am. Jur. 946 Judgments, sec. 210, Misconception of Remedy; 18 Am. Jur., Election of Remedies, p. 133, sec. 10, Choice of Remedies, p. 146, sec. 24, Mistake as to Remedy; American Law Institute, Restatement of Law of Judgments, p. 193, sec. 49; p. 271, sec. 65; p. 272, sec. 65; p. 276, sec. 65.

The fact that petitioner filed suit in the state court for statutory administrative review of a zoning board decision which it regarded as illegal and null and void, and was denied relief in that forum because it had misconceived its remedy, does not bar a second suit in the federal courts for non-statutory review, by complaint for injunction, of this allegedly illegal agency decision. This point does not need any further exposition because the appeals court has declined to put its affirmance on the grounds given by the district court, saying (Op. p. 6, App. A hereto 7a) "It is our duty to affirm, if the decision below is correct although the lower court might have relied upon a different ground or reason."

5. The appeals court had the power and the right to allow petitioner's motion for leave to file Amendment to Complaint setting up matters of fact tending to show that the agency decision was illegal, invalid and null and void because the proceedings before the agency amounted to a denial of due process to petitioner and the agency decision was based on a misconception of the law.

Wiggins Ferry Co. v. *Ohio and Mississippi Railway Company* (1892) 142 U.S. 396,

> (p. 413) "When the facts of the case show the plaintiff to have an equitable title to relief, this court, while it may be unable to afford such relief upon the case made in the bill, has in several instances asserted its power to remand the case to the court below for an amendment of the pleadings and such further proceedings as may be consonant with justice." (citing cases)

Jones v. *Meehan* (1899) 175 U.S. 1

> (p. 29) "But as this court might, even now, if justice appeared to require it, allow an amendment of the pleadings, this part of the case may be more satis-

factorily disposed of by considering what the effect of these facts could have been had they been duly pleaded." (citing cases)

These cases involved the power of *this* court, but the court's language indicated clearly that the power also existed in the intermediate appellate courts. The statute 28 U.S.C.A. sec. 2106 expressly so provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Marranzano v. *Riggs National Bank of Washington, D.C.* (D.C. Circuit 1950) 184 F. 2d 349 is an instance of the exercise of this power by a court of appeals. Plaintiff had sued to recover damages for alleged wrongful discharge from her employment. The district court entered a judgment granting the defendants' motion to dismiss the complaint, and the plaintiff appealed. The court of appeals held that *the court erred* in dismissing the complaint on the theory that employee had no right to sue for damages suffered through employers' breach of collective bargaining agreement with union, prohibiting discharges except for good and sufficient cause, but that *the complaint was insufficient to state cause of action* for failure to allege facts showing that reason for discharge was not good and sufficient. However, the appeals court decided that in the interest of substantial justice the case should be remanded so that plaintiff might have an opportunity to amend her complaint:

(p. 351) . "(8, 9). It thus appears that the complaint should have been dismissed for failure to state a cause of action, and not for the reasons assigned by the District Court. Ordinarily a correct decision of a trial court should be affirmed, even though based on an incorrect ground. *The ends of justice would be better served in this case, we think, by remanding it so that appellant may be afforded an opportunity to amend her complaint.*" (emphasis supplied)

The appeals opinion here (op. p. 3, App. 3a hereto) is in error in its intimation that amendment in the appellate courts should be allowed only to show federal jurisdiction. While 28 U.S.C. 1653 expressly authorizes amendments for such purpose, 28 U.S.C. 2106, and the cases cited above, are broader in scope and allow the court to vacate "any order . . . before it for review . . . directing the entry of such appropriate . . . order, or require such further proceeding . . . as may be just under the circumstances." The situation here — where the appeals court notwithstanding F.R.C.P. 12(b) indicated that it would give consideration to the board decision and felt concluded thereby, although same had not been considered by the district court — gave the appeals court the power, and indeed the duty, to further substantial justice by allowing plaintiff to present matters that would or might invalidate this agency decision.

The appeals court is also in error when it says (op. p. 3 App. 2a here): "The motion did nothing more than allege what was fully known to the plaintiff when it originally filed its complaint and instituted its action on June 5, 1957." This statement pre-supposes that it was incumbent upon plaintiff in filing its complaint to anticipate defendant's defenses. But this was not the law either before the Rules or since the Rules.

41 Am. Jur. 351, Pleading, Sec. 87 Anticipating Matters of Defense. "It is a general rule of pleading, applied both under the common law practice and under the modern procedural statutes and rules of practice, that the plaintiff is not bound in his declaration or complaint to anticipate defenses which the defendant may have to the cause of action asserted against him, and so draw his pleading as to negative their existence or avoid them. The plaintiff may not, and is not bound to, know what justification will be presented by the defendant, and *a salutary rule of pleading requires that such matters be left to the answer.*" (emphasis supplied)

See also *71 C.J.S. 198, Pleading, Sec. 84, Anticipating Defenses.*

The federal rules have not changed the law; F.R.C.P. 8 states that the complaint shall contain ". . . (2) a short and plain statement of the claim showing that the plaintiff is entitled to relief"; nothing about anticipating defenses.[3]

6. The state administrative review act providing that an agency decision can be reviewed only by statutory administrative review should not be construed as extinguishing the statutory substantive right of petitioner to prevent zoning violations, conferred under the later amendment to 73-9.

The state supreme court has held that to have "standing" to bring statutory administrative review, the plaintiff must show special damage; therefore plaintiff, not

[3] The opinion indicates that the appeals court did not regard the right to amend as the dispositive issue, and that even if the Amendment had been filed in the district court, the decision would still have been against plaintiff because of the court's view that the agency decision was "final" and not subject to any judicial review by plaintiff.

showing such special damage, cannot bring such suit. Article 73-9, as it existed prior to 1953 provided that suits to prevent zoning violations could be brought by "the proper legal authorities of the municipality;" a neighboring property owner also could then sue but he would have to show "special damage." The state legislature by the 1953 amendment expanded the class of persons who could sue to include "any owner or tenant of real property in the same contiguous zoning district," so that such parties, who could before the amendment sue only by showing special damage, could thereafter sue without such showing.

The appeals opinion held that the right under 73-9 is controlled by 110-265 and that if, because of no showing of such special damage, the property owner lacks "standing" to bring administrative review, then under 110-265 he is barred from any judicial review. This construction of 110-265 is in error for several reasons: 1st, it is a principle of construction in case of conflicting statutes, that the later in time will prevail over the earlier, the special over the general. If there is conflict here, 73-9 (A.D. 1953) is later in time than 11 265 (A.D. 1945) and is special (relating to zoning violations) while the other is general (relating to any administrative review). 2nd, the appeals opinion would nullify the 1953 amendment to 73-9; the only effect of the amendment is to expand the right to sue to prevent zoning violations to property owners without special damage (those with special damage already had the right) and if such "non-special damage" owner cannot sue in administrative review for lack of "standing" and cannot sue in injunction because administrative review is his only remedy, then the state legislature has created a substantive right for which there is no remedy. 3rd: the common sense construction of 110-265 is that plaintiff is denied any other mode of review if,

but only if, he has the remedy of administrative review. 4th: the construction of 110-265 adopted by the appeals opinion would, as noted below, make it unconstitutional here as depriving plaintiff of its statutory substantive right without due process of law, that is judicial review; and, therefore, such construction should not be adopted.

7. The proceeding before the agency amounted to a denial of procedural due process to petitioner: (a) the agency decision on which respondents rely, held that the proposed structure was a "permitted use", and reversed the building commissioner who had decided otherwise, but the agency did not have jurisdiction to make such a decision because the application, notice and proceeding were on a different issue, namely an application for a variation. The building commissioner had denied respondents' application for a building permit because the commissioner determined that the structure was in violation of the zoning ordinance (A 35). Under the state law, respondents then had two choices: 1st under 73-5 to appeal to the board on the theory that the commissioner was in error and seek a reversal of his decision; or 2d to accept the decision as correct, but to apply under 73-4 to the board for a "zoning variation." Respondents followed the latter course; their pleading, the application, the public notice, even the number of the case (524-55-Z) were all on the basis of an application for "zoning variation"; there was no appeal. Indeed the decision itself of the board so recites (A 35) since the decision commences with significant language:

> "Subject—Application to vary the requirements of the zoning ordinance."

Therefore the board's jurisdiction was confined to an "application for zoning variation", and the board had no jurisdiction to hear an appeal; any attempt to do so was a violation of due process. But the board decision was

on another distinct issue; the board decided that the structure was a "permitted use", that the commissioner's decision was in error and should be revoked. (Petitioner in its statement of the case above, p. 9 footnote, has pointed out that while the board decision was in the alternative, a "permitted use" or a "variation", that the only basis on which respondents can rely in the present case is "the permitted use" because respondents in the state court have abandoned the variation theory and the state lower court order so provides (**A** 46).

The state court has repeatedly held that unless there is sufficient notice in proper legal form and *advising defendant of the issues he must meet,* there is a failure of due process and the court lacks jurisdiction. *Northern Trust Co.* v. *Sanford,* 308 Ill. 381, 392 (1923), *Sheaff* v. *Spindler,* 339 Ill. 540, 555 (1930), *Lewis Drainage Dist.* v. *Melville,* 388 Ill. 526, 531, 532 (1945).

It is self-evident that the statutory notice and the statements of the board and the whole tenor of the record, demonstrate that the proceeding was not an appeal from the commissioner's ruling but was an application for a zoning variation; that the board after having conducted the hearing on this issue and having closed proof and taken the case under advisement, could not under the requirements of due process—without any notice to petitioner or any new publication to the public—shift the nature of the proceeding and convert it into an appeal.

The action of the board was unusual; it seems a fair inference that the board members had made up their minds to authorize the disputed structure, and if the evidence was not sufficient to support a zoning variation under the state statute with its requirement that "practical hardship, etc." be shown (Art. 73-4), that the board members were going to authorize the structure on some other basis. It is not unreasonable to attribute some of the board's zeal to the fact that Hartnett, one of the board members, was president of respondent club.

Yet, it is on the legality of such a shift by the board that respondents' stand is based.

(b) The agency was a biased tribunal in that one Hartnett, president of respondent club, was a member of the agency and participated actively in the hearings. Exhibit A-V **SA** 1, pp. 21-22 shows that during the board hearing Hartnett interrogated one Stanton (a witness for respondents) whether he, Stanton, had not previously expressed an opinion (presumably in Hartnett's presence outside the hearing) that if the structure were set back in conformity with the ordinance, it would have to go 12 stories in height. Further, while the matter was under advisement by the board, Hartnett wrote a circular letter to club members stating: "It is hoped that the zoning board will approve our plan for the garage," the same zoning board of which Hartnett was a member. As might have been expected, the board *did* approve the plan.

Due process requires that a judicial or quasi-judicial officer be free from any conflict of interest. See *Tumey* v. *Ohio* (1927) 273 U.S. 510; *In re Murchison et al.* (1955) 349 U.S. 133, 136; *Commissioners of Drainage District* v. *Smith* (1908) 233 Ill. 417, 425-426; *City of Naperville* v. *Wehrle* (1930) 340 Ill. 579; *Smith* v. *Department of Registration* (1952) 412 Ill. 332, 343. Particularly see; *In re Heirich* (1957) 10 Ill. 2d 357:

> (p. 385) "For the guidance of this court's commissioners in future cases and of all other persons required to find facts or apply law in adversary proceedings, judicial or administrative, we hold that when such an arbiter has a financial interest in the subject matter, even though he personally be a man of the most fastidious probity, it is his duty to recuse himself. He must do so if challenged."

Barbara Realty Company v. *Zoning Board of Review*, (R. I. 1957) 128 A. 2d 342, involved an issue of board member prejudice in a zoning variation case. Some time before the application there, a member of that board had indicated in a casual conversation that he favored an amendment of the city ordinance to permit the construction applied for. The supreme court of Rhode Island held that this statement had disqualified him as an impartial official, and quashed the board's decision.

Once the tribunal has been revealed as prejudiced, the law does not require showing of any particular incidence of the prejudice. But, if such showing were required, the record here would furnish it. For example: the zoning ordinance provides for a front line setback of 10% of the lot depth. The garage parcel here abuts only on one street, Chestnut St.; the vehicle entrance and exit of the proposed garage are on Chestnut St.; and Chestnut St. is obviously the front line of the parcel. When respondent presented an application for a building permit for a structure to extend to the street line instead of set back 12 feet (10% of the parcel depth), the commissioner denied the permit, for the reason, among others, that the absence of setback was not in conformity with the zoning ordinance. But in the present proceeding, the board has decided that the commissioner was wrong, and that the proposed garage —*without any front line setback and built up to the street line*—would be a "permitted use" under a proper construction of the ordinance. And how did the board attempt to support this astounding conclusion? By arguing that in spite of the fact that the garage parcel abuts on Chestnut St. and on no other street, nevertheless the real front line of the parcel is not on Chestnut St. but is on N. Lake Shore Drive, 267 feet distant from the closest line of the garage parcel! An examination of the sketch, **Annex A** to

Complaint (A 17) will establish the unreality of such an argument. It is only natural to conclude that such a violent wrenching of the meaning of language was caused by the obvious wish of the board to help their fellow member Hartnett obtain the favorable ruling to which in his circular letter to the club members (SAI Ex. A VII) he had referred so hopefully.

(c) It was error for the agency to receive or consider evidence which was not presented at open hearing and as to which plaintiff had no opportunity to inspect, consider and cross examine witnesses or offer evidence in explanation or rebuttal.

United States v. *Abilene & Southern Ry. Co.* (1924) 265 U.S. 274; *Morgan* v. *U.S.* (1936) 298 U.S. 468, 480; *C. & E. I. Ry. Co.* v. *Commerce Commission* (1930) 341 Ill. 277, 285; *Smith* v. *Department of Registration and Education* (1952) 412 Ill. 332, 347, 348; *Flick* v. *Gately* (1946) 328 Ill. App. 81.

See also *Brown-Pacific Maxon Company* v. *Toner*, 7th Cir. No. 12198, May 16, 1958, 255 F. 2d 611 reversing the district court because *the charge that* the agency had received evidence from defendants (*statements by physicians as to injuries*) out of the presence of plaintiffs and without notice to them or their attorneys, if proved, showed a violation of due process and the district court erred in not permitting plaintiffs an opportunity to prove the allegations of their proffered amendment.

The hearings were concluded and the case taken under advisement on Nov. 1, 1955. Two days thereafter, Lakefront Realty attorneys wrote the board a letter giving the alleged legal description of the entire club property. At some other undisclosed date after the close of the hearings, Lakefront Realty furnished the board with a sketch

of the proposed garage location, a photograph, and floor plans. **S.A.I.** p. 9, Ex. A-VI. None of these documents was submitted at the hearing; as to none did petitioner have a right to inspect, consider, cross examine or rebut. The board in its decision (particularly par. 7, **A** 40-41) relied on the documents and, based upon them, concluded that the front line of the proposed garage would not be E. Chestnut Street and therefore subject to any setback. *If these documents had been submitted at open hearing,* petitioner could have dealt with this theory and cross-examined and introduced rebuttal. As it was, petitioner was deprived of these rights.

But there was more. Not only did the board in its consideration of the case (after the closing of proofs and without the knowledge of petitioner) receive important documents that had never been offered in evidence, but it is obvious that Hartnett (and probably the other members of the board) were informed of, and gave consideration to, *statements made by a witness outside of the hearing* and outside of the presence of petitioner. No other meaning can be given to the colloquy between the witness Stanton and the board member Hartnett (**Exhibit A-V**); *Mr. Hartnett*: "I want to ask Mr. Stanton a question. Didn't you express an opinion that if any setback were required it would be necessary to go into a mechanically operated facility, something like twelve stories in height?" A. "You could do this with a mechanically operated facility but you couldn't do it with a ramp garage." *Mr. Hartnett*: "You said that would mean about twelve stories in height?" A. "Something like that."

1st, it was a denial of due process for the board, with Hartnett as a member, to hear the application of Lake Shore Club of which Hartnett was president; *2nd,* it was also a denial of due process for the board to consider

any evidence received outside of the hearing. But *a fortiori*, it was denial of due process, a compounding of the previous violations, for Hartnett, as member of the board with a *conflicting interest*, to receive evidence outside the hearing from respondents' witness.

8. The agency decision is based on a misconception of law as to the construction of the applicable zoning regulation.

Petitioner in its objections before the agency and in its petition here, contends that the proposed structure would violate the applicable zoning regulations in four respects: (i) a garage such as this is not a "permitted use" in this district; (ii) the regulations prohibit a structure whose area is more than 50% of the site area; (iii) the regulations require a setback from the "front street line" of 10% of the average lot depth; (iv) the regulations require a setback from the rear lot line of 20 ft. Petitioner contends that each of these objections to the proposed structure is good, but petitioner believes that to develop objections (i), (ii) and (iv) would take up more space than is proper in this petition and petitioner will therefore confine itself to developing briefly objection (iii) and showing how the agency decision has misconceived the applicable law on this issue.

The regulation, 194A-18(b) (App A hereto 23a) provides:

> "(b) No part of the ground area of any building in an Apartment House District shall be nearer to the front street line than a distance equal to 10% of the average depth of all lots, pieces or parcels in such use district fronting in the block in which the building is located."

The ordinance has some applicable definitions, 194A-2, (App. A hereto 20a):

> "Street line. The dividing line between the street and abutting lot, piece or parcel. The front street line is the shortest street line."

From the maps attached to petitioner's complaint (A 15, A 17) it appears that respondents' parcel consists of a rectangle 145 feet from east to west, and 122 feet from north to south; that it abuts on E. Chestnut Street on the north; that the shortest distance from any point in the parcel to N. Lake Shore Drive (the street to the east) is over 262 feet, that the lots 49, 50 and 51 have been platted as extending south from Chestnut. It appears from the complaint (par. 13-a thereof A 9) that the garage structure will have its vehicle entrance and its vehicle exit on the north or Chestnut Street side thereof. On this record, the natural conclusion is that Chestnut Street is the front street line and there must be a 10% (12 foot) setback from Chestnut Street; but the agency construed the regulations otherwise. Disregarding these realities, the agency by an adroit bit of gerrymandering decided that since respondents also owned the club building to the east of the garage parcel, that the garage site should be construed, not as the rectangle on which the structure is to be built, but as the *whole club building area* extending several hundred feet to the east to Lake Shore Drive; that Lake Shore Drive thus becomes the narrow front of all respondent's property and that Chestnut Street is not the front line of the garage structure but a side line, and that the structure may extend up to the Chestnut Street line. (Agency decision par. 4 (A. 38, 39), par. 7 (A. 40, 41)) It is a fair assumption that the agency, in reaching this extraordinary conclusion, wanted to help their fellow member, Hartnett, the president of respondent club.

A cursory examination of the map (**A.** 15, 17) will show that the front street line of the garage is Chestnut Street on which the lots face, and on which the building will face, and on which will be the vehicle entrance and exit, and that the agency in deciding that the front street line was Lake Shore Drive, over 262 feet east, was disregarding the letter and the spirit of the regulations. But there is even stronger confutation of the agency position that this whole area must be treated as *one corner* lot with the Lake Shore Drive as the narrow boundary. The zoning regulations expressly forbid such a treatment of an area this size, 194A-2 (App. 19a):

> "*Lot.* An area of land designated as a lot on a plat of subdivision recorded or registered pursuant to statute. Each building and its accessory buildings shall be all on a separate lot. A corner lot is a lot, piece or parcel not more than 8,000 square feet in area adjoining two street lines which form an angle of not more than 120 degrees."

This definition not only provides that each building shall be on a separate lot, but even more conclusive here, that *a corner lot shall not have more than 8,000 square feet.* The garage site in question here itself has 17,000 square feet which would preclude it from being part of any corner lot. And, of course, the area on Lake Shore Drive extending 250 feet on Chestnut and 158 feet on Lake Shore Drive (**A.** 17) has much more than 8,000 square feet. The agency decision concluded that the 10% front line zoning regulation does not require a 10% setback from Chestnut Street. It is easy to see why the building commissioner denied the building permit and why respondents filed this application to get a variation from this front setback. The correctness of the commissioner's decision is confirmed by the fact that respondents filed

the application for "zoning variation" in which they asked for leave to erect a garage

> "* * * and whose front street wall will be on the lot line instead of set back 12 feet, on premises at 257-69 E. Chestnut Street;". (A. 35)

The agency decision on petitioner's other objections is also unsound as a matter of law but because of limitations of space petitioner is not here developing this.

9. On this record, to deprive petitioner of judicial review, would be a violation of substantive due process.

This court has laid down certain general principles in regard to the requirements of substantive "due process" as to (a) the right to judicial review and (b) the scope of such review. From the cases, it appears that a plaintiff is always entitled to a judicial review of an agency decision as to (i) whether the agency lacked jurisdiction, (ii) whether the agency had misapplied the law, (iii) whether the agency's finding of fact had support of substance in the record.

St. Joseph Stock Yards v. *U.S.*, (1936) 298 U.S. 38, contains a clear and emphatic enunciation of the general principles.

> (p. 52) "But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights *at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.* That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the

question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reason of convenience to disregard it in others. *The principle applies when rights either of person or of property are protected by constitutional restrictions.* Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." (emphasis supplied)

In *Shields* v. *Utah Idaho Central Railroad Company*, 305 U.S. 177 (1938), the court held that a determination of the Interstate Commerce Commission under the Railway Labor Act, that an electric line is not "inter-urban", though not in itself an "order" (*Shannahan* v. *U.S.*, 303 U.S. 596) subjects the carrier to regulation by the Mediation Board and to criminal punishment if its orders are disobeyed, and its validity is subject to judicial review in a suit in equity brought by the carrier against the United States Attorney to restrain prosecutions. The court further held that upon review of such determination of the Interstate Commerce Commission, the question is whether the Commission acted within its statutory authority; and where the requirement as to hearing was satisfied, the sole remaining question would be whether the Commission, in arriving at its determination, departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. The court examined these issues and decided that the Commission order there was in accordance with the law and should be sustained.

See also *Wadley Southern Ry.* v. *Georgia* (1915) 235 U.S. 651, 660, 662; *Ohio Valley Water Co.* v. *Ben Avon*

Borough, (1920) 253 U.S. 287; *Crowell* v. *Benson* (1932) 285 U.S. 22; *Stark* v. *Wickard* (1943) 321 U.S. 288.

See *42 Am. Jur. Public Administrative Law, sec. 186* (Court Review) *Generally; sec. 187, Area in which Constitution Requires Review; sec. 197, Exhaustion of Administrative remedies.* See in particular *sec. 209* (questions open to review) *Generally,*

(pp. 610-617): "In general, in the absence of valid statutory provisions or other factors affecting the scope and extent of judicial review, administrative determinations will not be interfered with by the courts *unless, but will be interfered with where,* the determination is beyond the powers which could constitutionally be vested in or exercised by an administrative authority; *the determination is without or in excess of the statutory powers and jurisdiction of the administrative authority,* the determination is an exercise of power so arbitrary or unreasonable as virtually to transcend the authority conferred, or is otherwise an abuse of discretion, or is in disregard of the fundamental rules of due process of law, as required by constitutional or statutory directions, as where made without adequate notice, fair hearing, and opportunity for the aggrieved party to present evidence, or in an otherwise irregular proceeding, or is tainted with matter which disclose fraud, mistake, bad faith, corruption, or collusion, or is based upon an error of law (*citing cases*)." (emphasis supplied)

See *Parker on Administrative Law* (Bobbs-Merrill Company, Inc., 1952), p. 274.

Schwartz on American Administrative Law (London, Sir Isaac Pitman & Sons, Ltd., 1950),

(p. 111): "Non-statutory review has been used to obtain review of American governmental activities for which no judicial remedy is provided by statute. Likewise, such review has been held to be available

where the review provisions of the relevant statute do not provide *an adequate substitute* or do not include the particular situation involved." (emphasis supplied)

The due process clause under the 14th Amendment is directed to the protection of the individual against the state and its agencies and is equally susceptible of application by the federal courts thereto. *Southern Ry. Co.* v. *Commonwealth of Virginia*, (1933) 290 U.S. 190.

(iii) This doctrine of judicial review of agency decisions is expressly stated in the Federal Administrative Procedure Act. The cases held that the Act does not change the existing law but is merely declaratory of it.

U.S.C.A. Title 5, Sec. 1009 (Administrative Procedure Act of 1946):

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any *relevant statute*, shall be entitled to judicial review thereof."

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that *prior, adequate and exclusive* opportunity for such review is provided by law."

"(c) Every agency action made reviewable by statute and every final agency action for which there is *no other adequate remedy* in any court shall be *subject to judicial review*. . . ." (emphasis supplied)

While the Act does not apply to state agency decisions, it has been held to be declaratory of the pre-existing law. *Atchison T & S F Ry. Co.* v. *U.S.*, D.C. Mo. 1955, 130 F. Supp. 76, affirmed, (1955) 350 U.S. 892. As such it is persuasive here.

It appears here that (1) the agency lacked jurisdiction for the reason that the application was for a "zoning variation" and the agency had no jurisdiction to pass on the matter as an "appeal" and to determine that the structure was a "permitted use". (2) the agency was a biased tribunal, (3) the agency heard evidence after the closing of proofs without petitioner having a chance to meet it. In addition to the above, the agency clearly misapplied the law because under the regulations the front street line here was East Chestnut Street and there should have been a 12 ft. setback therefrom. For all these reasons, both procedural and substantive due process requires that petitioners must have a right of judicial review; if the state administrative review is not available, then by the historic remedy of injunction.

10. The appeals opinion holds that petitioner cannot sue here to prevent what the building commissioner has determined to be a zoning violation; because there is no violation since the board has decided the structure is a permitted use; this is begging the question because the board decision is not "final" but is subject to judicial review.

The appeals opinion (p. 5, App. hereto 5a) recognizes that 73-9 (in its present form as amended in 1953) is

> "clearly designed to give a land owner or tenant in the same contiguous zoning district, in addition to the proper municipal authorities, the right to enjoin, on his own initiative, any construction that would be in violation of the zoning ordinance."

The opinion, however, reasons that since the zoning board, on appeal from the building commissioner, has ruled that the proposed structure would be a "permitted use" and not in violation of the zoning regulation, that 73-9 does not apply; further, that the legality of the board's decision could only be reviewed under the state administrative review act, and petitioner having attempted such review and having been denied such review because of lack of statutory "standing"—no special damage—has no right of review in this or any other forum. Petitioner points out again that there has never been a judicial review of the *merits* of the board decision. Petitioner has a state-conferred substantive right to enforce any violation of the zoning ordinance; the building commissioner's denial of a building permit[5] is *prima facie* evidence of such violation; the action of the agency in holding that the structure would not be a violation, and ordering the permit to issue was, like any other administrative decision necessarily subject to judicial review; if petitioner were entitled to statutory administrative review under the state act, petitioner was relegated to such remedy, but if petitioner were held to lack "standing" to bring statutory administrative review (because of the absence of a "special damage" element that was not a condition precedent to petitioner's statutorily conferred substantive right) then petitioner was entitled to the non-statutory review of the agency decision by the historic suit for injunction. Petitioner has a state-conferred substantive right to enjoin a zoning violation; the building commissioner has determined that the proposed structure would be a zoning violation; if re-

[5] "Application not approved. Proposed improvement does not conform with requirement of zoning ordinance." A35.

spondents contend that the board decision has reversed and set aside the commissioner's order, it is up to respondents to show that that decision was legal; respondents do not sustain this burden by successfully objecting to petitioner's "standing" to bring statutory administrative review and then, when petitioner, as in this case, brings non-statutory review, contending that statutory review is the only remedy. Respondents' position (which the appeals court adopted) is that while petitioner has a state-conferred substantive right to enjoin a zoning violation, nevertheless, a determination by the agency that there is no violation—no matter how contrary to due process or the enabling statute or the facts—is *final* and *conclusive*. To give such an effect to an agency decision would be to hold that petitioner had a "right" and to hold at the same time that all "remedy" had been taken away "with finality" by an administrative agency, without recourse to judicial review. This, petitioner submits, would be a violation of due process.

11. The opinion in stating that as a result of the state court decisions, plaintiff has no right of action in a federal court for injunction under 73-9: (a) misconceives the condition of the state law, and (b) overlooks the well established rule that federal courts in applying equitable remedies to substantive rights are not bound by state court decisions as to those remedies.

(a) The opinion (p. 7) (App. hereto, 7a) cites *222 East Chestnut Street Corp.* v. *LaSalle National Bank* (1957) 15 Ill. App. 2d 460, 463, as holding that plaintiff "has no right of action under 73-9." Petitioner points out: (1) The court apparently overlooked the preamble to the 1953 Amendment (App. hereto, footnote 15a, 16a expressing an explicit legislative policy that injunction *should* be granted; (2) The case in question was not heard on the pleadings but was heard on the evidence. Admitting for

argument that *after a final hearing on the evidence* the court *may* have equitable discretion to grant or not grant injunction, does not mean that an injunction would never be granted. (3) The state appellate court in the case cited, did not deny plaintiff's right under 73-9 but merely denied the remedy of injunction under the facts as there revealed on a full hearing. (4) The state supreme court has apparently recognized not only the substantive right as given by 73-9, but the remedy of injunction and has also enforced the provision for attorney's fees—*Pasfield* v. *Donovan*, (1956) 7 Ill. 2d 563.

(b) But there is another and even more controlling point that the opinion has overlooked, namely that the "rule of decision" doctrine, Tit. 28, Sec. 1652 relates only to matters of *substantive* law but does not relate to matters of *procedure*, and that where a substantive right is created under state law, the federal courts in enforcing that right will not be bound by state precedents. See *Guaranty Trust Co.* v. *York*, (1945) 326 U.S. 99,

> (pp. 106-107): "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it. Whatever contradiction or confusion may be produced by a medley of judicial phrases severed from their environment, the body of adjudications concerning equitable relief in diversity cases leaves no doubt that the federal courts enforced State-created substantive rights if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure, and in so doing they were enforcing rights created by the States and not arising under any inherent or statutory *federal* law."

The application here seems plain. The state statute, 73.9, has conferred on petitioner, as a qualified property owner, a right to prevent or abate a violation of the zoning regulations; but under the above language, the state law cannot define or limit the federal court in the remedies which the latter must give in a diversity case, and a federal court may award an equitable remedy for a substantive right recognized by the state, "even though a state court cannot give it." Petitioner submits that the decisions so cited in the opinion are no reasons for affirmance; that the matter should be heard upon its merits and that after such hearing it will be open to the federal court to grant such relief as *federal procedure deems fit.*

CONCLUSION.

Petitioner submits that the appeals opinion is so clearly in conflict with the decisions of this court and other courts of appeal on important issues of procedure and substantive law as to call for an exercise of this court's power of supervision; that notwithstanding the 1946 amendment to F.R.C.P. 12(b), the opinion holds that an affirmative defense in bar can be set up on a motion to dismiss; that even if the agency decision were open to consideration on the present motion, petitioner should have been given the right to plead matters to invalidate same; that the matters set up in petitioner's proposed Amendment showed that the agency decision was contrary to law and that the appeals court had the power and the duty to allow the Amendment to be filed; that the opinion is in error in holding that petitioner has no right of judicial review of such agency decision; that under the appeals

opinion petitioner will suffer both a procedural and a substantive denial of due process.

Courts have often said that procedural due process is nothing more than a requirement that there be fair play; but certainly a denial of fair play is revealed in the sorry record of this agency proceeding, with respondents' president sitting as an agency member at the agency hearing and prompting respondents' witness, with the agency receiving evidence *ex parte* after the close of proofs, with the agency hearing the cause on one issue, and then deciding it on another issue that had never been presented, noticed or heard.

Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

JOSEPH F. ELWARD,
Attorney for Petitioner.

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APPENDIX A.

(256 F.2d 513)

IN THE

UNITED STATES COURT OF APPEALS.

FOR THE SEVENTH CIRCUIT.

No. 12224 SEPTEMBER TERM 1957 — APRIL SESSION 1958

222 EAST CHESTNUT STREET CORPORATION, a corporation of Delaware, *Plaintiff-Appellant*,

v.

LAKEFRONT REALTY CORPORATION, a corporation of Illinois; LAKE SHORE CLUB OF CHICAGO, a corporation of Illinois; NORTHWESTERN UNIVERSITY, a corporation of Illinois; GEORGE L. RAMSEY, individually and as Commissioner of Buildings of City of Chicago; CITY OF CHICAGO, a municipal corporation of Illinois; RICHARD J. DALEY, individually and as Mayor of City of Chicago, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 18, 1958

Before DUFFY, *Chief Judge*, MAJOR and PARKINSON, *Circuit Judges*.

PARKINSON, *Circuit Judge*. Plaintiff, in the District Court, sought to enjoin the defendants City of Chicago, a municipal corporation, and George L. Ramsey, as Commissioner of Buildings of City of Chicago, from issuing to defendant Lakefront Realty Corporation, or its agents, employees or contractors, a building permit to erect a three-and-four-story split level garage structure on its real estate and the defendant Lakefront Realty Corporation from erecting or attempting to so erect such struc-

ture. It also sought a declaratory judgment construing the Chicago Zoning Ordinance as meaning and providing that the erection of the garage structure is in violation of said ordinance and illegal. It further prayed for an abatement of any such alleged violation.

The defendants filed a motion to dismiss supported by affidavit attaching thereto findings and order of the Zoning Board of Appeals authorizing the proposed construction as a valid use of the property in question; the judgment of the Superior Court of Cook County, Illinois affirming and approving the decision of the Zoning Board of Appeals; and the opinion of the Supreme Court of Illinois, 10 Ill. 2d 130, affirming the judgment of the Superior Court.

On October 31, 1957 the District Court granted the motion of the defendants to dismiss and did so dismiss the plaintiff's complaint and action. This appeal followed, the plaintiff having filed written notice of appeal on November 29, 1957 appealing "from the final judgment entered in this cause on October 31, 1957, dismissing said complaint and action."

On April 25, 1958, after submission to and argument of counsel in this court, the plaintiff filed a written motion moving this court to dismiss the appeal and remand the cause to the District Court with directions to vacate its order dismissing the complaint and allow plaintiff to file an amendment thereto upon an entirely different theory. The motion did nothing more than allege what was fully known to the plaintiff when it originally filed its complaint and instituted its action on June 5, 1957.

Thereafter, on May 3, 1958, the plaintiff filed a motion to amend its prior motion filed on April 25, 1958 "by praying, in the alternative, for additional relief, namely that (i) said Motion and the Amendment to Complaint be taken and considered with this appeal, with leave to defendants-appellees to file answer thereto within such time as the court may direct, and for (a) an order reversing the judgment of the court below, or (b) an order vacating the judgment of the court below with directions to allow

plaintiff to file said Amendment, or (ii) for such other order in the court's discretion as will allow this matter to be disposed of on its merits, and upon such terms as the court may seem proper;".

When the District Court entered its order on October 31, 1957 dismissing plaintiff's action the plaintiff, as no responsive pleading had been served by the defendants, had, in the alternative, the right as a matter of course to amend its complaint pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure or the right to stand on its complaint and appeal from the judgment of dismissal. The plaintiff appealed and by so doing elected to stand on its complaint. *Asher* v. *Ruppa,* 7 Cir., 1949, 173 F. 2d 10.

The plaintiff briefed and argued this appeal upon the theory that its complaint was clearly sufficient and that the District Court committed reversible error when it dismissed. Plaintiff's motion filed April 25, 1958 incorporated the proposed amendment to the complaint. This motion was filed after the hearing of this appeal here. Apparently after argument of counsel plaintiff realized its complaint was inadequate and, by now seeking to amend, inferentially so admits. In no event, however, is the plaintiff seeking to amend defective allegations of jurisdiction pursuant to Title 28 U.S.C.A. § 1653. *Chicago Stadium Corporation* v. *State of Indiana,* 7 Cir., 1955, 220 F. 2d 797, is, therefore, inapplicable. Plaintiff in its motion to amend its first motion filed on April 25, 1958 illustrates clearly the difference when it states that in *Chicago Stadium* this court held "that allegation in complaint that plaintiff is a resident of state of Illinois, and that defendants and each of them are residents of the state of Indiana was insufficient to allege federal jurisdiction on the basis of diversity of citizenship, but that plaintiffs should be permitted to amend complaint to show federal jurisdiction." That is permissible under Title 28 U.S.C.A. § 1653 and Chief Judge Duffy speaking for this court so held. That, however, is not the situation here.

The plaintiff cites *U. S.* v. *F. & M. Schaefer Brewing Co.*, 1958, 356 U.S. 227, and *Jung* v. *K. & D. Mining Co., Inc.*, 1958, 356 U.S. 335, as supporting its contention that the Federal Rules of Civil Procedure should be liberally construed so that suits are determined on their merits and not on procedural technicalities. These cases had to do with appeals pertaining to whether notice of appeal was timely filed. We followed similar reasoning in *Nolan* v. *Bailey*, No. 12226 decided on May 8, 1958. Again those cases have nothing to do with the question here presented.

The plaintiff here is not attempting to avoid dismissal because it failed to file a timely notice of appeal or that the order appealed from is not a final judgment. On the contrary it is asking this court to dismiss its own appeal in order that it may amend a complaint, which it apparently now admits will not withstand the motion to dismiss, and be permitted to start all over in the lower court. This it seeks to do by alleging matters by way of amendment completely foreign to jurisdictional allegations and which matters were all known to the plaintiff long prior to the commencement of this action. There is no reasonable or logical foundation for such a request. Accordingly the motion of the plaintiff-appellant filed on April 25, 1958, as amended pursuant to its motion to amend filed on May 3, 1958, must be denied.

The plaintiff alleges that the proposed construction is in violation of the Chicago Zoning Ordinance and premises its right to maintain this action solely upon Ill. Rev. Stat. 1955, c. 24, § 73-9, which reads in part as follows:

> "Proceedings To Prevent Violation. In case any building or structure is *constructed*, re-constructed, altered, repaired, converted, or maintained, or any building, structure, or land is used *in violation of this article*, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, or any owner or tenant of real property in the same contiguous zoning district as the building or structure in question, in addition to other remedies, may institute any appro-

priate action or proceeding (1) to prevent the *unlawful construction*, re-construction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate *the violation.*" (Emphasis added)

This section would appear to be explicit in its terms. There is no ambiguity, patent or latent, and its purpose is readily apparent. It was clearly designed to give a land owner or tenant in the same contiguous zoning district, in addition to the proper municipal authorities, the right to enjoin, on his own initiative, any construction that would be in violation of the zoning ordinance. Therefore, it is obvious that § 73-9 applies only where there is a violation of the zoning ordinance and of course where there is no such violation § 73-9 is inapplicable.

The plaintiff-appellant has attempted, by judicial review pursuant to § 73-6.01 of the Zoning Act, to set aside the findings and order of the Zoning Board of Appeals that the proposed construction was a permitted use. By the terms of the Administrative Review Act, Ill. Rev. Stat., 1955, c. 110 § 265 "any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof." In its action to review the plaintiff was unsuccessful.

The affidavit in support of the motion to dismiss the complaint is not attacked by the plaintiff and clearly establishes that the proposed construction is not in violation of the Chicago Zoning Ordinance but rather is in full accordance therewith. Attached to the affidavit are the findings and order of the Zoning Board of Appeals of the City of Chicago entered after a full hearing with the plaintiff appearing and objecting wherein the Board specifically found that the proposed construction would be a permitted use and would not be in violation of the zoning ordinance.

Thereafter, this plaintiff filed a proceeding in the Superior Court of Cook County, Illinois to review the decision and order of the Zoning Board of Appeals. The judgment of that court is attached to the affidavit in support of the motion to dismiss wherein the reviewing court specifically found that the finding and decision of the Zoning Board of Appeals that the proposed construction "was a permitted use under the applicable provisions of the Chicago Zoning Ordinance, was not against the manifest weight of the evidence and is well founded on the evidence presented;" and "that the decision of the Zoning Board of Appeals of the City of Chicago • • • be an the same hereby is affirmed and approved."

Plaintiff appealed from that judgment to the Supreme Court of Illinois. The opinion of that court, reported at 10 Ill. 2d 130, is also attached to the affidavit in support of the motion to dismiss. The Supreme Court of Illinois affirmed the judgment of the Superior Court of Cook County. Hence the proposed construction is not in violation of the Chicago Zoning Ordinance and, therefore, any right of action predicated on § 73-9 completely collapses. In short there is no issuable fact to be tried. *222 East Chestnut Street Corporation* v. *LaSalle National Bank*, 7 Cir., 1958, 253 F. 2d 484.

The plaintiff has completely misconstrued § 73-9. This section is a part of the Zoning Enabling Act and must be construed *in pari materia* with the other sections of the Act. Its purpose is to prevent violations of a zoning ordinance, that is unauthorized uses. It does not create another method of judicial review of an order of the Zoning Board of Appeals. When the Zoning Board of Appeals has heard the matter and rendered its decision authorizing a proposed construction, whether by a finding of permitted use or by granting a variance, there is no right of action under § 73-9. There is but one method of attack and that is by judicial review pursuant to the provisions of the Illinois Administrative Review Act. Section 73-9 can not be used for that purpose. It is specifically prohibited by the Administrative Review Act.

One of the grounds of the motion to dismiss is:

"4. • • • and the Statute of the State of Illinois, Illinois Revised Statutes (1955) C. 24 §73-9, upon which plaintiff purports to rely, does not grant to plaintiff the right to bring such action."

This was a valid ground for dismissing the complaint. It is our duty to affirm if the decision below is correct although the lower court might have relied upon a different ground or reason. *Helvering* v. *Gowran*, 1937, 302 U.S. 238, 245; *Securities and Exchange Commission* v. *Chenery Corporation*, 1943, 318 U.S. 80, 88; *Ginsburg* v. *Black*, 7 Cir., 1956, 237 F. 2d 790, 792.

Moreover, the Illinois Supreme Court in *222 East Chestnut Street Corporation* v. *Board of Appeals, et al.*, 10 Ill. 2d 130, held that this plaintiff was not adversely affected by this very same proposed construction. In its reply brief plaintiff states its position "is that estoppel arises not from the points that are raised but from the points that are decided" and concedes that this decision constitutes an estoppel against any future administrative review action. Accordingly the plaintiff admits that it is not a party adversely affected by the proposed construction. If it is not adversely affected then it has suffered or will suffer no damage and the Appellate Court of Illinois has held in *222 East Chestnut Corporation* v. *LaSalle National Bank et al.*, 1957, 15 Ill. App. 2d 460, 463, it has no right of action for injunction under §73-9. Although this is an Appellate Court decision it is apparent from *222 East Chestnut Street Corporation* v. *Board of Appeals et al.*, 10 Ill. 2d 130, 132, that the Supreme Court of Illinois would come to no different conclusion and we, therefore, should follow 15 Ill. App. 2d 460. *Liberty Mutual Ins. Co.* v. *Hartford Accident & Ind. Co.*, 7 Cir., 1958, 251 F. 2d 761, 763.

The District Court was correct in dismissing the complaint and the judgment is AFFIRMED.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS.

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois

Wednesday, June 18, 1958

Before

Hon. F. Ryan Duffy, Chief Judge

Hon. J. Earl Major, Circuit Judge

Hon. W. Lynn Parkinson, Circuit Judge

222 EAST CHESTNUT STREET CORPORATION, Etc.,
Plaintiff-Appellant,

No. 12224

v.

LAKEFRONT REALTY CORP., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby affirmed with costs.

APPENDIX C.

IN THE

UNITED STATES COURT OF APPEALS.

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois

Thursday, July 17, 1958

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. J. Earl Major, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

222 EAST CHESTNUT STREET CORPORATION, Etc.,
Plaintiff-Appellant,

No. 12224

v.

LAKEFRONT REALTY CORP., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that appellant's petition for rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D.

The statutes involved (being excerpts from Ill. Rev. St. (1957)) Chapter 24—Cities and Villages Article 73. Special Powers—Zoning.

Ch. 24, Art. 73-3. Enforcement officers — Board of appeals.) All ordinances passed under the terms of this article[1] shall be enforced by such officers of the municipality as may be designated by ordinance.

(A) In municipalities having a population of more than 500,000 the city council may provide for the appointment of a board of appeals consisting of five members to serve respectively for the following terms: One for one year, one for two years, one for three years, one for four years and one for five years, the successor to each member so appointed to serve for a term of five years.

(B) The city council in cities and the president and board of trustees in villages and incorporated towns, having a population of less than 500,000 may provide for the appointment of a board of appeals consisting of seven members to serve respectively for the following terms: One for one year, one for two years, one for three years, one for four years, one for five years, one for six years, and one for seven years, the successor to each member so appointed to serve for a term of five years. The term of office of each member of a zoning board of appeals holding office on the effective date of this amendatory Act is abolished, but the incumbents shall continue to exercise all the powers and be subject to all the duties of members until new members are appointed and qualified.

(C) In all municipalities, one of the members so appointed shall be named as chairman at the time of his appointment. The appointing authority has the power to remove any member of the board for cause, and after

[1] Section 73-1 et seq. of this chapter.

public hearing. Vacancies shall be filled for the unexpired term of the member whose place has become vacant. All meetings of the board of appeals shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating that fact, and shall also keep records of its examinations and other official actions. Every rule, regulation, every amendment or repeal thereof, and every order, requirement, decision, or determination of the board shall immediately be filed in the office of the board and shall be a public record.

(D) In all municipalities the board of appeals shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this article.

(E) In all municipalities it shall also hear and decide all matters referred to it or upon which it is required to pass under such an ordinance. The concurring vote of four members of the board is necessary to reverse any order, requirement, decision, or determination of such an administrative official, or to decide in favor of the applicant any matter upon which it is required to pass under such an ordinance or to effect any variation in the ordinance, or to recommend any variation or modification in the ordinance to the corporate authorities. As amended by act approved July 15, 1953. L.1953, p. 1503.

Ch. 24, Art. 73-4. Enforcement Officers—Board of Appeals) (a) In municipalities of 500,000 or more population, the regulations authorized by the Article may be varied in their application only by the board of appeals of the municipality, subject to the power of the corporate

authorities to prohibit, in whole or in part, the granting of variations in respect to the classification, regulation and restriction of the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses. Variations shall be permitted by the board of appeals only when they are in harmony with the general purpose and intent of the regulations and only in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of those regulations relating to the use, construction or alteration of buildings or structures or the use of land. In its consideration of the standards of practical difficulties or particular hardship, the board of appeals shall require evidence that (1) the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in that zone; and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality. A variation shall be permitted only if the evidence, in the judgment of the board of appeals, sustains each of the three conditions enumerated. The corporate authorities may provide general or specific rules implementing, but not inconsistent with, the rules herein provided to govern determinations of the board of appeals. A decision of the board of Appeals shall not be subject to review, reversal or modification by the corporate authorities but shall be judicially reviewable under the provisions of Section 73-6.01.

• • •

(g) Every variation, whether made by the board of appeals directly, or by an ordinance after a hearing before the board of appeals, shall be accompanied by findings of fact specifying the reason or reasons for making the variation.

Ch. 24, Art. 73-5. Appeals to board of appeals.) An appeal to the board of appeals may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality. The appeal shall be taken within such

time as shall be prescribed by the board of appeals by a general rule by filing with the officer from whom the appeal is taken and with the board of appeals a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In this event the proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application and on notice to the officer from whom the appeal is taken, and on due cause shown.

The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties and decide the appeal within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as in its opinion ought to be made in the premises and to that end has all the powers of the officer from whom the appeal is taken.

Ch. 24, Art. 73-6.01. Review) All final administrative decisions of the board of appeals under this Article shall be subject to judicial review pursuant to the provisions of the "Administrative Review Act", approved May 8, 1945, and all amendments and modifications thereof, and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 1 of the "Administrative Review Act." Added by act approved July 30, 1949. L. 1949, p. 568.

Ch. 24, Art. 73-9. Proceedings to prevent violation) In case any building or structure is constructed, reconstructed, altered, repaired, converted or maintained, or any building,

structure or land is used in violation of this article, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, or any owner or tenant of real property in the same contiguous zoning district as the building or structure in question, in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation. When any such action is instituted by an owner or tenant, notice of such action shall be served upon the municipality at the time suit is begun, by serving a copy of the complaint on the chief executive officer of the municipality, no such action may be maintained until such notice has been given.

In any action or proceeding for a purpose mentioned in this section, the court with jurisdiction of such action or proceeding has the power and in its discretion may issue a restraining order, or a preliminary injunction, as well as a permanent injunction, upon such terms and under such conditions as will do justice and enforce the purposes of this article.

If a permanent injunction is decreed in any action or proceeding for a purpose mentioned in this section, the court in its decree may, in its discretion, allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney. This allowance shall be a part of the costs of the litigation assessed against the defendant, and may be recovered as such. As amended by act approved June 24, 1953, L. 1953, p. 431.[1]

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[1] **The above amendment was made by Ill. Laws 1953, H.B. No. 609, being Ill. Session Laws 1953, pp. 431-433. The Preamble and Emergency clause are as follow[s]:**

"CITIES AND VILLAGES ZONING

"PREAMBLE.

"§1. Amends Section 73-9 of Act of 1941 §2. Emergency

Chapter 110—Administrative Review Act.

An Act in relation to judicial review of decisions of administrative agencies. Approved May 8, 1945.

Sec. 264 § 1. Definitions) For the purpose of this Act "Administrative Agency" means a person, body of persons, group, officer, board, bureau, commission or department (other than a court, judge, justice of the peace or magistrate), of the State, or of any political subdivision thereof or municipal corporation therein, having power under law to make administrative decisions.

(Continued)

"§73-9. Proceedings to prevent violation.

"(HOUSE BILL NO. 609. APPROVED JUNE 24, 1953.)

"AN ACT to amend Section 73-9 of the 'Revised Cities and Villages Act', approved August 15, 1941, as amended.

"WHEREAS, a proper enforcement of the Zoning Laws is essential in order to promote and protect the health, safety, morals and welfare of the public; and

"WHEREAS, the failure to secure proper enforcement of the Zoning Laws leads to the blighting of properties and the creation of slums and increase in incidence of crime, epidemic, disease and fire, together with great loss and injury in tax delinquency and the necessity of slum clearance programs; and

"WHEREAS, the profits derived from the operation of properties in violation of the Zoning Laws are often so great that the imposition of fines in actions at law are inadequiate and no deterrent; and

"WHEREAS, proper and effective enforcement requires injunctive relief; and

"WHEREAS, proceedings for injunction relief involve substantial costs and expense; and

"WHEREAS, the proper prosecution and enforcement of Zoning Laws by injunctive relief is in the public interest and will promote the health, safety, morals and welfare of the public and should be encouraged in the interests of the People of the State of Illinois; and

"Administrative decision" or "decision" means any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency. In all cases in which a statute or a rule of the administrative agency requires or permits an application for a rehearing or other method of administrative review, and an application for such rehearing or review is made, no administrative decision of such agency shall be final as to the party applying therefor until such rehearing or review is had or denied. The term "administrative decision" or "decision" does not mean or include rules, regulations, standards, or statements of policy of general application issued by an administrative agency to implement, inter-

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[1] (Continued)

"WHEREAS, the proper prosecution of such proceedings will constitute an effective deterrent against the violation of the Zoning Laws; therefore

"BE it enacted by the People of the State of Illinois, represented in the General Assembly:

"SECTION 1. Section 73-9 of the 'Revised Cities and Villages Act', approved August 15, 1941, as amended, is amended to read as follows:

* * *

(Here follows the wording of 73.9 as amended, see above)

"§2. WHEREAS, it is a matter of common knowledge that a serious public emergency exists in the violation of Zoning Laws and that failure to secure proper enforcement of the Zoning Laws has led and will continue to lead to panic selling, to loss in taxable values of land and buildings throughout the municipality, to congestion and to injury to the public health, safety, comfort, morals and welfare; that to prevent such perils, preventive action by the legislature is imperative; that such action is necessary in order to prevent and forestall profiteering, speculation and other destructive processes tending to produce threats to the public health and welfare, therefore an emergency exists and this Act shall take effect upon its becoming a law."

Approved June 24, 1953. (Ill. Rev. Stat., Vol. 1, p. 608)

pret, or make specific the legislation enforced or administered by it unless such a rule, regulation, standard or statement of policy is involved in a proceeding before the agency and its applicability or validity is in issue in such proceeding, nor does it mean or include regulations concerning the internal management of the agency not affecting private rights or interests.

Sec. 265. § 2. Scope of Act.) This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof.

Unless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision. If under the terms of the Act governing the procedure before an administrative agency an administrative decision has become final because of the failure to file any document in the nature of objections, protests, petition for hearing or application for administrative review within the time allowed by such Act, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter.

APPENDIX E.

The Ordinances involved, being excerpts from the Chicago Zoning Ordinance passed December 3, 1942, as amended, Municipal Code of Chicago, Chapter 194A.

194A-2 (Section 2). Rules of construction-definitions. In the construction of this ordinance the rules and definitions contained in this Section 2 shall be observed and applied except when repugnant to the context of any provision.

Nothing contained in the Chicago Zoning Ordinance shall be deemed to be a consent, license or permit to use any property or to locate, construct or maintain any building, structure or facility or to carry on any trade, industry, occupation or activity. The provisions in the Chicago Zoning Ordinance are cumulative and additional limitations upon all other laws and ordinances, heretofore passed or which may be passed hereafter, governing any subject matter in the Chicago Zoning Ordinance.

• • •

Apartment—A room or suite of rooms, arranged, designed, used or intended to be used as a single housekeeping unit.

Apartment House—A building other than a duplex residence in which there are two or more apartments.

• • •

Block—All that part of one side of a street which is between two intersecting or intercepting streets, or between an interseeting or intercepting street and a railroad right of way or waterway.

Building—Any structure with substantial walls and roof securely affixed to land and entirely separated on all sides from any similar structure by space or by walls in which there are no communicating doors, windows or similar openings.

• • •

Family Residence—A building entirely separated from any other building by space, designed, arranged, used or intended to be used as one apartment.

Duplex Residence—A building entirely separated from any other building by space, designed, arranged, used or intended to be used as two apartments, one of which is on a floor or floors above the other.

Garage—A private garage is a compartment within or attached to a residence or any building located on a land area on which a residence is located, designed, arranged, used or intended to be used for the storage of the private passenger automobiles of the occupants of the residence.

A community garage is two or more private garages.

A public garage is any building, other than a private or community garage, designed, arranged, used or intended to be used for the storage of motor vehicles other than trucks, tractors, truck trailers and commercial vehicles exceeding two-ton capacity.

Lot—An area of land designated as a lot on a plat of subdivision recorded or registered pursuant to statute. Each building and its accessory buildings shall be on a separate lot.

A corner lot is a lot, piece or parcel not more than 8,000 square feet in area adjoining two street lines which form an angle of not more than 120 degrees.

Lot Lines—The dividing lines between a public way and an abutting lot, piece or parcel or the projected dividing lines between lots, pieces and parcels without regard to any recorded plat. The front lot line is the front street line. The rear lot line is the lot line most nearly parallel to the front lot line. Other lines are side lot lines.

Parcel—Two or more pieces or a lot and a piece or more intended to be used as a unit.

Street Line—The dividing line between a street and abutting lot, piece or parcel. The front street line is the shortest street line.

194A-4 (Section 4.) Use Districts. The following use districts designated on the use district map hereby are established, viz: (1) Family Residence; (2) Duplex Residence; (3) Group House; (4) Apartment House; (5) Specialty Shop; (6) Business; (7) Commercial; (8) Manufacturing; (9) Industrial; (10) Motor Freight Terminal.

No use shall be made of any land area or building within any use district except such as is designated hereinafter as a permitted use in that district nor shall any building be erected, reconstructed, altered or enlarged unless it is designed, arranged and intended for a use which is permitted in the district in which the building is located. However, pending development of any land for urban uses, a truck farm, tree nursery, golf grounds or similar use may be made of such land.

• • •

194A-8. (Section 8.) Apartment House districts. Permitted uses in Apartment House districts are:

• • •

(2) Apartment house;

• • •

(5) Club, fraternity or sorority house, when not operated for pecuniary profit;

• • •

(7) Auxiliary uses, subject to the following limitations:

A sign may be maintained on any land area or building, if the sign is not more than 2 square feet in area and if it is located not nearer to the street line than the building line and if it does not advertise anything except the names and occupations of the occupants;

A restaurant may be maintained in a hotel, if the public entrance to the restaurant is from the lobby of the hotel

and no sign advertising the restaurant is visible to persons outside of the hotel.

* * *

194A-14 (Section 14.) **Volume districts.** The following Volume districts designated on the Volume district map hereby are established, viz.: 1st Volume; 2nd Volume; 3rd Volume; 4th Volume.

No building shall be erected, reconstructed, altered or enlarged, nor shall the area of any lot, piece or parcel improved with a building be reduced (except for the purposes of a public way) so that the ground area, the height or the volume of the building will exceed the maximum specified in this ordinance, or so that the building lines will extend beyond the distance specified in this ordinance, for the class of building designated in the Volume district in which the building is located.

No lot, piece or parcel of land shown on plat of subdivision, recorded or registered on the effective date of this ordinance shall be divided for building purposes so as to establish a building line nearer to the front street line of said lot, piece or parcel of land as recorded or registered than the distance specified in this ordinance, unless a plat of re-subdivision of all that part of the block comprising all lots fronting on the same street has been recorded or registered as required by law in relation to plats.

In any family residence and duplex residence district no piece or parcel consisting solely of pieces shall be built upon for any primary use as permitted in such district, unless said piece or parcel has a minimum frontage and a minimum area equal to the minimum lot frontage and area of any lot in the block as shown on the recorded and registered plat of the subdivision in which said piece or parcel is located or unless there is presented to the Superintendent of Maps a statement or drawing certified to by a licensed surveyor or architect showing that said piece or parcel is equal to or exceeds in frontage the average frontage of at least 33 per cent of the improved pieces or parcels in the block, provided, that in excess of 33 per

cent of the frontage of the block is so improved, or unless said piece or parcel has been or will be shown as a lot on a plat of resubdivision recorded or registered as required by law in relation to plats and filed with and approved by the Superintendent of Maps when authorized by the City Council in each case.

The frontage of a corner lot, piece or parcel of land located in a family residence, duplex residence, group house and apartment district shall not be changed unless a plat of re-subdivision of said corner lot, piece or parcel of land has been recorded or registered as required by law in relation to plats and filed with and approved by the Superintendent of Maps when authorized by the City Council in each case. (Amend. Coun. J. 3-10-47, p. 7330; 9-29-48, p. 2972; 7-11-51, p. 598.)

194A-15 (Section 15.) Ground area of buildings. In 1st Volume districts, the maximum ground area of all buildings, exclusive of garage, is 40 per cent of the area of a corner lot and 35 per cent of the area of any other lot, piece or parcel in Family Residence, Duplex Residence, Group House or Apartment House districts.

In 2nd Volume districts, the maximum ground area of all buildings, exclusive of garage, is 45 per cent of the area of a corner lot and 40 per cent of the area of any other lot, piece or parcel in Family Residence, Duplex Residence, Group House or Apartment House districts.

In 3rd Volume and 4th Volume districts, the maximum ground area of all buildings, exclusive of garage, is 60 per cent of the area of a corner lot and 50 per cent of the area of any other lot, piece or parcel in Apartment House districts.

In each Volume district the maximum ground area of all buildings, exclusive of garage, is 75 per cent of the area of any lot, piece or parcel in a Specialty Shop district provided that if any building on the lot, piece or parcel in a Specialty Shop district contains one or more apartments the maximum ground area of all buildings,

exclusive of garage, on that lot, piece or parcel shall be the same as in Apartment House districts.

In each Volume district the ground area of a private garage or community garage shall be not less than 200 square feet nor more than 220 square feet for each automobile to be stored or parked there. (Amend. Coun. J. 7-11-51, p. 598.)

194A-18. (Section 18.) Building lines. (a) No part of the ground area of any building in Family Residence, Duplex Residence or Group House districts shall be nearer to the front street line than a distance equal to 15 per cent of the average depth of all lots, pieces or parcels in any such use district fronting in the block in which the building is located.

(b) No part of the ground area of any building in an Apartment House district shall be nearer to the front street line than a distance equal to 10 per cent of the average depth of all lots, pieces or parcels in such use district fronting in the block in which the building is located.

(c) No part of the ground area of any building containing one or more apartments in Family Residence, Duplex Residence, Group House, Apartment House or Specialty Shop districts shall be nearer to the rear lot line than 20 feet.

(d) No part of the ground area of a building in a Family Residence or Duplex Residence district shall be nearer to the side lot lines than 3 feet or 10 per cent of the width of the lot, piece or parcel, whichever is greater, excepting where the side lot line adjoins a public way.

(e) Where the side lot line of a corner lot, if extended, would be the front lot line of another lot, piece or parcel nearer than 10 feet to the corner lot, no part of the ground area of any building on the corner lot shall be nearer to the intersection of such side lot line and the rear lot line than a straight line projected from a point in the side lot line to a point in the rear lot line, each point equal in dis-

tance from said intersection to the distance of the building line from the front lot line of such other lot, piece or parcel, as specified in this Section 18.

• • •

194A-22. (Section 22.) Variations. The City Council, by ordinance, may determine and vary the application of the provisions of this ordinance in harmony with their general purpose and intent and in accordance with the rules adopted by this ordinance in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of the provisions of this ordinance relating to the use, construction or alteration of buildings or structures or the use of land. However, no such variation shall be made by the City Council, except in a specific case and after a public hearing before the Board of Appeals pursuant to notice and after a report, with a finding of fact, of the Board of Appeals as provided by the laws of this State.

194A-23. (Section 23.) Rules governing variations. No variations shall be allowed:

• • •

7. To permit a building to be erected, reconstructed, altered or enlarged so that the ground area, the height or the volume of the building will exceed the maximum specified in this ordinance, (a) unless the building is used or designed for (1) a church, (2) a grade, high school or Sabbath school wherein no living quarters are maintained and when not operated for pecuniary profit, (3) a hospital, nurses' home, boarding school, vocational school, college or university in an Apartment House district or less restricted district when not operated for pecuniary profit, or (b) unless the building is used or designed for an apartment house or hotel located in a 3rd or 4th Volume district and the variation is for the purpose of providing additional space on the ground floor to be used only as a waiting room, lobby, lounging room, auditorium or service room, or (c) unless the lot is in a Family Residence, Duplex Residence, Group House or Apartment House district in a block in which 50 per cent or more of the frontage is im-

proved with buildings exceeding the maximum ground area, height or volume specified in this ordinance in which case a variation may be allowed, provided that the ground area, height or volume shall not exceed that of any existing building in that block; but a variation may be allowed to permit the erection of additional stories to a building in an Apartment House district or less restricted district, if the foundation thereof existing on the effective date of this ordinance was designed to carry such additional stories, provided that if the building is in an Apartment House or Specialty Shop district the volume of such building shall not exceed the maximum specified in 3rd Volume districts unless the building is located in a 4th Volume district and if the building is in a Business district or less restricted district the volume of such building shall not exceed the maximum specified in the 4th Volume districts;

8. To permit a building to be erected, reconstructed, altered or enlarged so that the building line will be nearer to the front street line than the distance specified in this ordinance (a) unless the lot is irregular in shape, typography or size, or (b) unless there is a building in the block which is nearer to the front street line than the distance specified in this ordinance, in which case the building line may be permitted to extend as near to the front street line as such non-conforming building;

9. To permit a building to be erected, reconstructed, altered or enlarged so that the building line will be nearer to the rear lot line than the distance specified in this ordinance unless the rear lot line abuts a public alley and the building is designed, arranged and intended to be used as an apartment house, in which case the building line may be permitted to extend not nearer to the rear lot line than 10 feet from the middle line of the alley; * * *

* * *

APPENDIX F.

The decision of the administrative agency.

This decision is contained in the Appellant's Appendix, printed for the court below, at pp. 35-43. It therefore will not be recopied here.

APPENDIX G.

Opinions of state supreme court.

The opinion of the state supreme court in petitioners' original application for state administrative review of the administrative agency decision (No. 34074, November 26, 1956, 10 Ill. 2d 130) is contained in Appellant's Appendix, printed for the court below, at pp. 47-48. It therefore will not be recopied here. This opinion refers to the opinion filed on the same day by the state supreme court in a companion case, which latter opinion reads:

222 East Chestnut Street Corporation, Appellant, vs. The Board of Appeals of the City of Chicago et al., Appellees, No. 34210, November 26, 1956, 10 Ill. 2d 132.

MR. CHIEF JUSTICE KLINGBIEL delivered the opinion of the court:

On application of La Salle National Bank, the Chicago zoning board of appeals granted a variation from setback provisions of the zoning ordinance, permitting the bank, as trustee, to erect a proposed apartment building up to the front lot line. The 222 East Chestnut Street Corporation, owner of an existing apartment building situated in the same zoning district, thereafter brought an action in the superior court of Cook County under the Administrative Review Act (Ill. Rev. Stat. 1955, chap. 110, par. 264 *et seq.*) seeking to reverse the decision. The superior court, after hearing questions presented by the record, affirmed the board's decision and dismissed the complaint. Plaintiff appeals directly to this court on the ground that the validity of a statute is involved.

The lot upon which defendant bank desires to build is situated at the southeast corner of East Delaware Place and North DeWitt Place. It has a frontage of 95 feet west to east on East Delaware, and a depth of 110 feet from north to south on North DeWitt. The ordinance re-

quires a setback of 10 per cent of the depth, or 11 feet in this case. The proposed apartment building is 23 stories in height with an attached garage at the rear having three stories and a basement. A 10-story apartment building on the adjoining lot to the east extends to its front lot line, which is the same line to which defendant bank desires to erect its building. The remaining building in the block is situated at its east end, and is separated from the 10-story building by a vacant lot. This remaining building is, likewise, built to the Delaware street lot line.

The plaintiff, whose apartment building is located about 185 feet southwest of the subject property, appeared at the hearing before the board and objected to the granting of a variance. To reverse the judgment of the superior court plaintiff contends that insufficient notice was given of the application and hearing thereon; that the amendatory act of 1955 (Ill. Rev. Stat. 1955, chap. 24, par. 73—4.) is unconstitutional in several respects; that the decision of the board failed to contain sufficient findings of fact as required by the statute; that the decision of the board is not supported by the record; that the trial court erroneously refused to make findings of fact and to state propositions of law; and that the board erred in finding that the applicant could build to the rear line of the lot.

It is necessary at the outset, however, to consider the question whether the plaintiff has an interest sufficient to entitle it to maintain an action under the Administrative Review Act. The defendants insist that plaintiff is not affected by the decision and has no standing to bring the present action. The plaintiff contends, on the other hand, that any owner in the same zoning district has a right to bring proceedings for review, and that it is unnecessary to show any individual proof of damage. To maintain this position plaintiff relies on a 1953 amendment to the zoning statute declaring that an action or proceeding to prevent zoning violations may be instituted either by the municipality or by any owner or tenant of real property in the same contiguous zoning district as the building in question.

(Ill. Rev. Stat. 1955, chap. 24, par. 73—9.) It is argued that this amendment "evinces a public policy of this State, that without any further showing, the owner of property shall be automatically entitled to bring suit for a zoning violation anywhere in the zoning district where the property is located."

The fact that the zoning statute purports to confer upon qualified owners a right to bring suit for violation does not answer the question presented here, however, which concerns the propriety of granting a variation rather than mere enforcement. We have heretofore held that the right to review a final administrative decision is limited to those parties of record in the proceeding before the administrative agency "whose rights, privileges, or duties are affected by the decision." (*Winston* v. *Zoning Board of Appeals*, 407 Ill. 588.) In that case a variance had been granted for construction of a 40-unit apartment building on certain property classified in a "B" country home district of Peoria County. A complaint, filed under the Administrative Review Act by other property owners who were parties of record before the zoning board, alleged that they owned property in the vicinity of the premises involved and that the value and use of their property were affected by the granting of the variance. In affirming a judgment dismissing the complaint, this court held that to state a cause of action specific facts must be alleged showing that the plaintiffs were injured or damaged by the decision sought to be reviewed.

In the case at bar the complaint alleges that granting the variation would substantially injure plaintiff's property in that its light, air and fire protection would be interfered with, its "taxable value" would be diminished, and traffic congestion would be increased near and in front of it. The allegations were denied by defendants. In its brief plaintiff fails to show any evidence whatever to support them, nor have we found such support in the record. It sufficiently appears that plaintiff's apartment building is situated in the same zoning district as the subject prop-

erty, and that its northeast corner is 184.5 feet due west from the southwest corner of the subject property. But it fronts on a different street, and the variation in question permits the proposed building to be erected on the front lot line, or 11 feet farther north from plaintiff's apartment building than the setback line would be. There is nothing in the physical situation of the two properties to justify an inference that plaintiff's building would be damaged by the granting of the variation.

In its argument on the point plaintiff does not contend there is evidence that it would be injured. Indeed, the plaintiff's only witness, its vice-president, testified on cross-examination that the variation would adversely affect plaintiff's building only "because it might be a precedent for other variations in the neighborhood," and that the allowance of this particular variation would not, of itself, have any adverse effect. The sole contention made, with respect to its standing to maintain the action, is that a showing of adverse effect is unnecessary if the two properties are in the same contiguous zoning district. We think such a contention cannot be sustained, and that under our decision in the *Winston case* it was incumbent upon plaintiff to allege and prove it would in fact be adversely affected by the board's decision. This it has failed to do.

In view of such conclusion the constitutional and other contentions made by the plaintiff, although argued extensively, need not be considered. The judgment of the superior court dismissing the action was correct and is hereby affirmed.

Judgment affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1958.

No. 452

222 East Chestnut Street Corporation, a corporation of Delaware,

Petitioner,

vs.

Lakefront Realty Corporation, a corporation of Illinois, et al.,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
For the Seventh Circuit

BRIEF AND ARGUMENT OF RESPONDENTS LAKEFRONT REALTY CORPORATION, a corporation of Illinois; LAKE SHORE CLUB OF CHICAGO, a corporation of Illinois; NORTHWESTERN UNIVERSITY, a corporation of Illinois; GEORGE L. RAMSEY, individually and as Commissioner of Buildings of City of Chicago; CITY OF CHICAGO, a municipal corporation of Illinois; RICHARD J. DALEY, individually and as Mayor of City of Chicago, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

These respondents oppose the granting of a writ of certiorari in this proceeding, and in support of their opposition we submit this Brief and Argument.

STATEMENT OF THE CASE.

This is a proceeding brought by petitioner to enjoin Lakefront Realty Corporation, one of the respondents, from constructing a building on a portion of its premises. The jurisdiction of the federal courts is based upon the diversity of citizenship among the parties. The action is allegedly brought pursuant to the Statutes of the State of Illinois, § 73-9, Chapter 24, Illinois Revised Statutes (1955).

The District Court sustained respondents' motion to dismiss the action and complaint. Attached to and made a part of that motion was the supporting affidavit of Marshall Keig, president of respondent Lakefront Realty Corporation, and four exhibits, three of which set forth *in haec verba* the decision reached by the Zoning Board of Appeals of the City of Chicago, Docket Number 524-55-Z (1955), the judgment of the Superior Court of Cook County affirming the Board's decision, *222 East Chestnut Street Corporation* v. *Board of Appeals*, Docket Number 56S 189 (1956), and, in turn, the judgment of the Illinois Supreme Court affirming the Superior Court decision *222 East Chestnut Street Corporation* v. *Board of Appeals*, 10 Ill. 2d 130, 139 N. E. 2d 221 (1956). These decisions were reached in prior proceedings between the petitioner and the respondents or their privies testing the right of Lakefront Realty Corporation to erect a building under the provisions of the Chicago Zoning Ordinance. Those prior proceedings were finally terminated when this Court denied petitioner's petition for writ of certiorari to the Illinois Supreme Court. *222 East Chestnut Street Corporation* v. *Board of Appeals*, 353 U. S. 984 (1957).

In the present case, petitioner appealed the adverse judgment of the District Court to the Court of Appeals.

After submission of the case to the Court of Appeals and argument of counsel, petitioner sought leave to dismiss its appeal and have the cause remanded to the District Court with leave to amend its complaint and later amended the motion. In support of its motion and the amendment to that motion, petitioner presented certain evidentiary exhibits which have been made a part of the record before this Court. Petitioner did not raise as a contested issue in the Court of Appeals the suggestion that it had been deprived of the right to meet and rebut respondents' motion to dismiss. (Opinion of the Court of Appeals, Appendix A to Petition, 5a). Petitioner now raises that issue for the first time.

The Court of Appeals, in affirming the judgment of the District Court dismissing the complaint, correctly held:

(1) that plaintiff had waived its right to file an amended complaint in the District Court by electing to stand on its complaint and appealing to the Court of Appeals, and that there was no issuable fact involved in the controversy; and

(2) that petitioner, having unsuccessfully pursued and exhausted a prior and exclusive remedy created by the statutes of Illinois, which had resulted in a holding by the Illinois court that there was no violation of the zoning ordinance, had no right of action under Sec. 73-9 of Chap. 24, Illinois Revised Statutes (1955), because that enactment applies only to relief against violations of the ordinance.

(3) that, as appears on the record, the issues which petitioner seeks to have determined in this suit were litigated in the prior action: that each of the provisions of the Chi-

cago Zoning Ordinance invoked by petitioner in this proceeding were involved in the former litigation; that the structure here in question is the same building as the one involved in the prior suit and that petitioner has previously had judicial review under Par. 265, Chapter 110, Illinois Revised Statutes (1955) of the decision of the Zoning Board of Appeals (Opinion of the Court of Appeals, Appendix A to Petition, 5 a, 6a).

CONTENTIONS OF RESPONDENTS.

Respondents contend:

1. That the Court of Appeals, in affirming the judgment of the District Court, correctly held that plaintiff had waived its right to file an amended complaint in the District Court by electing to stand on the complaint it filed.

2. That no issue of fact is involved in this controversy.

3. That the Court of Appeals correctly held:

(a) that plaintiff's action was founded on the theory that petitioner had a right of action under Sec. 73-9 of Chap. 24 of the Illinois Revised Statutes (1955).

(b) that the right of action referred to in that section was based on a violation of the zoning ordinance.

(c) that no violation of the zoning ordinance was involved in this case but, on the contrary, the Illinois courts had correctly held that the construction did not constitute a violation of the ordinance.

4. That, therefore, the writ of certiorari should not be granted because:

(a) no federal question is involved, and

(b) there is no case or controversy between the parties to this action.

5. The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals in the same matter and the supposed federal question is urged for the first time before this Court.

STATUTES INVOLVED.

Following are all the relevant portions of the statutory provisions referred to herein:

Illinois Cities and Villages Act.
(Illinois Revised Statutes, 1955, Chapter 24, pars. 73-6.01 and 73-9)

"73-6.01. (Review) All final administrative decisions of the board of appeals under this article shall be subject to judicial review pursuant to the provisions of the Administrative Review act," * * *"

"73-9. (Proceedings to prevent violation). In case any building or structure is constructed, reconstructed, altered repaired, converted or maintained, or any building, structure or land is used in violation of this article * * * the proper local authorities of the municipality, or any owner or tenant of real property in the same contiguous zoning district as the building * * * may institute any appropriate action or proceeding * * * (4) to restrain, correct or abate the violation.

Illinois Administrative Review Act.
Illinois Revised Statutes, 1955, Chapter 110, par. 265)

"265. § 2 (Scope of Act). This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof."

ARGUMENT.

I.

THIS CASE IS NOT WITHIN THE JURISDICTION OF THIS COURT.

1) No federal question is involved.

The right which petitioner attempts to assert in this action arises, if at all, under the laws of Illinois. Petitioner's complaint is specifically based on §73-9, Chapter 24, Illinois Revised Statutes (1955). Its gravamen is that the proposed structure of respondent Lakefront Realty Corporation is in violation of the Chicago Zoning Ordinance.

The decision of the Court of Appeals is expressly based upon the construction and application of the statutes of Illinois; the one, specifically applicable in unambiguous terms to the abatement and prevention of zoning violations, the very statute upon which petitioner supposedly relies; the other, the Illinois Administrative Review Act which provides an exclusive remedy for the judicial review of the decisions of administrative agencies, a remedy which the legislature of Illinois has made applicable to the review of the decisions of Zoning Boards of Appeals and a remedy which the present petitioner has pursued and exhausted in prior proceedings between petitioner and the respondents or their privies.

The Court of Appeals held that § 73-9 gave no right of action to petitioner, saying at pages 5a, 6a, Appendix A to petition:

> "* * * 73-9 applies only where there is a violation of the zoning ordinance and of course where there is no such violation § 73-9 is inapplicable.

"The plaintiff-appellant has attempted, by judicial review pursuant to § 73-6.01 of the Zoning Act, to set aside the findings and order of the Zoning Board of Appeals that the proposed construction was a permitted use * * *

"* * * the Zoning Board of Appeals * * * after a full hearing with the plaintiff appearing and objecting * * * found that the proposed construction would be a permitted use and would not be in violation of the zoning ordinance.

"Thereafter, this plaintiff filed a proceeding in the Superior Court of Cook County, Illinois to review the decision and order of the Zoning Board of Appeals. The judgment of that court is attached to the affidavit in support of the motion to dismiss wherein the reviewing court specifically found that the finding and decision of the Zoning Board of Appeals that the proposed construction 'was a permitted use under the applicable provisions of the Chicago Zoning Ordinance, was not against the manifest weight of the evidence and is well founded on the evidence presented;' and 'that the decision of the Zoning Board of Appeals of the City of Chicago * * * be and the same hereby is affirmed and approved.'

"Plaintiff appealed from that judgment to the Supreme Court of Illinois. The opinion of that court, reported at 10 Ill. 2d 130, is also attached to the affidavit in support of the motion to dismiss. The Supreme Court of Illinois affirmed the judgment of the Superior Court of Cook County. Hence the proposed construction is not in violation of the Chicago Zoning Ordinance and, therefore, any right of action predicated on § 73-9 completely collapses."

Section 2 of the Illinois Administrative Review Act provides in part, that:

"* * * any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the

effective date hereof." (§ 265, C. 110, Ill. Rev. Stat, 1955).

In construing this Statute, the Court of Appeals held that:

> "There is but one method of attack and that is by judicial review pursuant to the provisions of the Illinois Administrative Review Act, Section 73-9 cannot be used for that purpose. It is specifically prohibited by the Administrative Review Act." (page 6a, Appendix A to petition)

The Illinois Statutes involved are explicit in their terms and admit of no other interpretation or application than that accorded them by the Court of Appeals. Its decision is wholly consonant with those reached by the Courts of Illinois.

In *322 East Chestnut Street Corp.* v. *Board of Appeals*, 10 Ill. 2d 132, 135 (1956), the Illinois Supreme Court held that § 73-9 applies only to the enforcement of the Zoning Ordinance. In *222 East Chestnut Street Corp.* v. *Board of Appeals*, 10 Ill. 2d 130, 132 (1956), the former action between the parties to this suit, the Illinois Supreme Court held that "* * * the plaintiff (petitioner here) is not aided by section 73-9 of the Revised Cities and Villages Act * * * providing that an action * * * to prevent a zoning violation may be instituted by * * * an owner or tenant of real property in the same contiguous zoning district." That same court further held that petitioner was not adversely affected by respondent Lakefront Realty Corporation's proposed structure, and a petition for writ of certiorari filed in the United States Supreme Court was denied. 353 U.S. 984 (1957).

In *222 East Chestnut Street Corp.* v. *LaSalle National Bank*, 15 Ill. App. 2d 460 (1957), petition for leave to appeal denied, 13 Ill. 2d advance sheet number 8, May

Term, 1958, Illinois Supreme Court, the Appellate Court of Illinois held that § 73-9 did not make any change in the organic law of Illinois and that the plaintiff must still allege and prove itself to be irreparably damaged before injunction could issue under the provisions of the very statute on which petitioner bases its right in this action. Petitioner neither can, nor do we understand that it does, controvert the fact that the Illinois Supreme Court has held that 222 East Chestnut Street Corporation is not adversely affected by respondent's actions. Petitioner's complaint filed in the District Court alleged merely that respondents' acts "would cause plaintiff immediate and irreparable damage and injury", the insufficiency of which, as a matter of pleading, is evident. In face of the conclusive determination that petitioner failed to show that it was adversely affected by respondents' actions, the decision of the Court of Appeals was inescapable.

This Court has seen no reason to disturb the same construction of the identical Illinois Statutes by the Court of Appeals in the recent case of *222 East Chestnut Street Corporation* v. *LaSalle National Bank*, 253 Fed. 2d 485 (C.A. 7, 1958), cert. den. October 13, 1958.

Petitioner asserts that it has, in the numerous actions between it and the respondents, been deprived of "due process". This insistence arose for the first time in the present action after the hearings below and at the moment when the case was at the point of decision. This contention ignores the fact that the violation of due process prohibited by the Constitution of the United States is the deprivation of "life, liberty or property" without due process of law. (U. S. Constitution, Amendment XIV, Section 1.)

Since as held by the Illinois Courts there was no violation of the Chicago Zoning Ordinance, petitioner obvi-

ously had no property of which it has been or can be deprived and hence no grounds upon which to base a claim of such deprivation.

The decision here attacked is based upon an interpretation of Illinois Statutes in accord with the construction of those same laws by the courts of Illinois. The decision below did not involve any federal question. It is concerned only with the laws of Illinois and as such its decision is not reviewable by this Court. *Darley* v. *Mayo*, 351 U. S. 277, 280-285 (1956); *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1952); *Angel* v. *Bullington*, 330 U.S. 183, 191-192 (1947).

2) There is no case or controversy between the parties to this action.

Moreover, the issues and controversy between petitioner and the respondents have been rendered moot by prior proceedings. The Court of Appeals properly held that this suit presented no issuable fact. There is here no case or controversy to which the judicial power of the United States can extend. (U.S. Constitution, Article III, Section 2.)

For this reason, the petition should be denied.

II.

THIS COURT SHOULD NOT REVIEW THIS CASE.

1) The supposed federal question now urged by petitioner was neither put in issue in the court below nor there decided.

Petitioner is now for the first time urging before this Court the proposition that, on a motion to dismiss, matters outside the pleadings may not be considered and that it had no reasonable opportunity of presenting such matters to the District Court.

Respondents attached to and made a part of their motion to dismiss a supporting affidavit and the judgments handed down in the prior proceedings between the parties to this suit.

Petitioner did not contest before the Court of Appeals the Court's right to consider these matters. Indeed, on its motion for leave to dismiss its appeal and amend its complaint and on its amendment to that motion, petitioner based its right and its prayer on Rule 15, Federal Rules of Civil Procedure. Petitioner did not then contend that it had been deprived of any opportunity to file briefs or counter-affidavits in the District Court.

The objection that petitioner had no opportunity of meeting the Motion or filing counter-affidavits is groundless. (Opinion of Court of Appeals, Appendix A to Petition, 5a).

Any question as to whether or not respondents' affidavit and the judgments of the Zoning Board of Appeals of Chicago, the Superior Court of Cook County and the Illinois Supreme Court could be considered on the motion to dismiss, is resolved by the provisions of Rule 12 (b), Federal Rules of Civil Procedure. The Court is there empowered to consider "matters outside the pleading." Respondents' motion was based upon (1) the Court's lack of jurisdiction of the subject matter; (2) the bar of *res judicata*; (3) the estoppel of former judgment, and (4) as a matter of law, the express bar of Par. 265 of Chapter 110 of the Illinois Revised Statutes and the fact that § 73-9 of Chapter 24 of the Illinois Revised Statutes, on which petitioner relies, gave no right of action to petitioner.

Respondents presented these matters by motion as they had the right to do under Rule 12(b) as well as under the de-

cided cases. *Nichols* v. *Alker* (D.C. N.Y. 1954) 126 F. Supp. 679, affirmed 231 F. 2d, 68, cert. denied 352 U.S. 829; *Larter & Sons* v. *Dinkler Hotels Co.* (C.A. Ga. 1952) 199 F. 2d 854; *Florasynth Laboratories* v. *Goldberg* (C.A. 7, 1951) 191 F. 2d 877; *348 Bloomfield Ave. Corp.* v. *Montclair Mfg. Co. Inc.*, (D. N.J. 1950) 90 F. Supp. 1020; *Nash-Kelvinator Corp.* v. *California Refrigerator Repair Shop* (DC Cal. 1950), 11 F.R.D. 313; *Jacobsen* v. *Overseas Tankship Corp.* (D.C. N.Y. 1950) 11 F.R.D. 97; *W. E. Hedger Transportation Corporation* v. *Ira S. Bushey & Sons* (C.A. 2, 1949) 186 F. 2d 236. The defenses so asserted go not merely to petitioner's failure to state a claim upon which relief can be granted. They also expressly contest the jurisdiction of the Court. These defenses, in substance, consist of the Statutes of Illinois and the judgments *in haec verba* of the tribunals which heard the prior proceedings between the parties to this action. In a word, the matters relied upon by respondents go uncontroverted because they are uncontrovertible.

For this reason, the petition should be denied.

2) The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter.

The Court of Appeals decided that petitioner had no right of action based on § 73-9 of Chapter 24 of the Illinois Revised Statutes, the statute under which this proceeding is brought. It further held Par. 265 of Chapter 110 of the Illinois Revised Statutes prohibited the maintenance of the present suit.

In passing upon petitioner's motion to dismiss its appeal and for leave to amend its complaint filed after submission of the case to the Court of Appeals, after the argument

of counsel there, and when the case was at the point of decision, the Court of Appeals indicated that:

> "'When the District Court entered its order on October 31, 1957 dismissing plaintiff's action the plaintiff, as no responsive pleading had been served by the defendants, had, in the alternative, the right as a matter of course to amend its complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure or the right to stand on its complaint and appeal from the judgment of dismissal. The plaintiff appealed and by so doing elected to stand on its complaint. *Asher v. Ruppa*, 7 Cir., 1949, 173 F. 2d 10." (page 3a, Appendix A to petition.)

This holding in no way conflicts with the decisions of other Courts of Appeal. Further, even granting for the sake of argument, that the Court had the power to allow the withdrawal and amendment, it did not abuse its discretion in declining to allow petitioner to begin its action anew. The law of Illinois is that injunction shall issue, if at all, only at the behest of a party whose damages are or will be irreparable. The Illinois Appellate Court has so held in a specific construction of § 73-9. *222 East Chestnut Street Corp.* v. *LaSalle National Bank*, 15 Ill. App. 2d 460 (1958). The Illinois Supreme Court has held that petitioner had not established that it was damaged by the actions of the respondents. *222 East Chestnut Street Corp.* v. *Board of Appeals*, 10 Ill. 2d 130 (1956).

The Federal Rules of Civil Procedure nowhere expressly prohibit the raising of affirmative defenses by a motion to dismiss. The requirement that such defenses be specially pleaded when set up by answer is designed to preclude the proof of affirmative defenses under a general denial and the risk of surprise, if on general issue such matters were proven. (Rule 8 (c), Federal Rules of Civil Procedure.)

Granting for the sake of argument that some of the defenses raised by motion in the instant case are affirmative defenses, still respondents had the right to elect to present these defenses by motion. (Rule 12 (b), Federal Rules of Civil Procedure.)

The fact that the defense of *res judicata* was supported in part by matters outside the record, none of which were controverted, does not preclude its consideration. As respondents have elsewhere shown (pages 12 and 13, this brief), it has long been the federal practice to consider affirmative defenses by motion when the facts are uncontroverted.

Petitioner contends that the rule is construed otherwise in some circuits. In support of this assertion it cites *Sarda* v. *McGrath* (D.C. Cir. 1952), 196 F. 2d 20, which decided only that a synopsis of certain deportation proceedings which was buried in defendant's brief and memo of points and authorities did not constitute an "affidavit" and could not be considered as a matter outside the pleadings in the determination of the motion to dismiss. In *Herron* v. *Herron* (C.A. 5, 1958), 255 F. 2d 589, cited by petitioner, the Court held that a motion raising the defense of the Statute of Limitations was improperly sustained not because the motion raised an affirmative defense but because there was a genuine issue of a material fact and because the lower court insisted on trying the action by affidavits and interrogatories. In *Boudidge* v. *Lehmann* (C.A. 6, 1958) 252 F. 2d 266, cited by petitioner, the Court made summary dismissal of the complaint on its own motion. The parties had no notion that such dismissal was being considered. The reviewing court reversed the decision below because it could not determine from the record before it whether or not there was a genuine issue of a material fact.

Respondents grant that, if matters outside the pleadings are considered on a motion based, as theirs is in part, on plaintiff's failure to state a claim upon which relief could be granted, the motion is to be treated as one for summary judgment. In a word, respondents agree that genuine issues of material fact may not be resolved by affidavits. However, respondents earnestly contend that, in the case at bar, there are no facts in dispute, indeed no controversy, between the parties to this action, and that the procedure followed in the District Court and affirmed by the Court of Appeals was proper within the letter and the spirit of the Federal Rules of Civil Procedure.

In fact, the Court of Appeals cited the relevant statutes of Illinois in the light of the undisputed fact that petitioner had pursued and exhausted the exclusive remedy created by the Illinois Administrative Review Act in a test of the legality of the structure here involved. In this case, there is no genuine issue of any material fact between petitioner and the respondents.

For this reason, the petition should be denied.

CONCLUSION.

We submit that this petition is without merit. This case is not within the jurisdiction of this Court. There is no federal question involved. There is no case or controversy to which the judicial power of the United States can extend. The supposed federal question which petitioner urges before this Court was not raised in the Court below nor there decided, and the decision of the Court of Appeals is not in conflict with decisions of other circuits on the same matter.

The decision below has no substantial significance in federal jurisprudence and we therefore urge that the petition for writ of certiorari be denied for lack of jurisdiction and want of merit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 452

222 East Chestnut Street Corporation, a corporation of Delaware,

Petitioner,

vs.

Lakefront Realty Corporation, a corporation of Illinois, et al.,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals, For the Seventh Circuit

REPLY BRIEF OF 222 EAST CHESTNUT STREET CORPORATION, PETITIONER,

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REPLY BRIEF OF 222 EAST CHESTNUT STREET CORPORATION, PETITIONER.

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner submits this Reply to the Brief and Argument of respondents, and renews its prayer that the petition for certiorari be granted.

Respondents have not answered petitioner's points.

Petitioner (pp 15-47) set up 11 points, some with sub-points, as to why the decision of the Court of Appeals should be reviewed. Respondents have not answered these points individually but have made a general answer which as to many of the points is unresponsive and leaves them admitted *sub silentio*. Petitioner (points **1-4**, pp 15-24) argued that on the existing complaint, the decision of the trial court sustaining a motion to dismiss because of alleged lack of averments as to jurisdiction and *res judicata* was in error; that the appeals court was also in error in affirming the trial court on the basis of the summary judgment practice, inasmuch as that practice was not applicable here because defendants' motion was not a motion for summary judgment and was not disposed of by the district court as such, and it would have been error for the district court to treat the motion as one for summary judgment and consider "extra-pleading" matters of affirmative defense unless (which was not done) petitioner were given notice thereof in the district court, and given opportunity to file counter-affidavit, as provided under Rule 12(b). Respondents nowhere meet these points.

Petitioner's points as to error below in treating defendant's motion to dismiss as a motion for summary judgment are substantial and controlling, and alone are sufficient to warrant this Court in granting review, because it is important that the practice under 12(b) be certain and uniform. But petitioner made other points of substance possibly even more important and controlling which respondents' Brief has largely ignored. Petitioner in the appeals court had made a Motion tendering a proposed Amendment to the Complaint and had asked that court to vacate the district court order of dismissal and grant

leave to file, or that the Amendment be taken with the appeal, or for such other *as would allow the matter to be disposed of on the merits.* The Amendment referred to the zoning board decision set up in the affidavit to respondents' motion and prayed for judicial review and voiding of this decision because (in violation of the provisions of the United States and Illinois constitutions) it deprived petitioner without due process of law of petitioner's statutorily conferred substantive right to prevent zoning violations and was erroneous, illegal and void in the following respects: (a) Hartnett, president of respondent club, was also a member of the agency and actively participated in the hearings before the agency on respondents' application for zoning. (b) Subsequently to the closing of proofs, the agency outside the presence of petitioner, received and considered evidence then presented by respondents as to which petitioner had no opportunity to inspect, consider, cross examine witnesses, or offer evidence in explanation or rebuttal. (c) The agency had no jurisdiction to enter the order reversing the building commissioner's decision because the matter came before the agency on respondents' application for a zoning "violation" and the matter not having come before the agency on appeal from the building commissioner's ruling denying the permit, the agency's jurisdiction was therefore limited to issue of the zoning "violation." (d) Even if the agency had jurisdiction to reverse the building commissioner's ruling in denying the building permit, the decision was erroneous and contrary to law because contrary to a proper construction of the zoning regulations. Respondents make no answer.

Petitioner (point 5, pp 24-27) argued that the appeals court had the power and the right to allow petitioner's motion for leave to file the tendered Amendment to Com-

plaint setting up matters of fact tending to show that the agency decision w s illegal, invalid and null and void because the proceedings before the agency amounted to a denial of due process to petitioner and the agency decision was based on a misconception of law; in support petitioner cited the statute and decisions from this Court. Respondents make no answer.

(e) Petitioner (point 6, pp 27-29) argued that the state administrative review Act, providing that an agency decision can be reviewed only by statutory administrative review, should not be construed as extinguishing the statutory right of petitioner to prevent zoning violations conferred under the later amendment to 73-9. Respondents make no answer.

(f) Petitioner (point 7, pp 29-35) argued that the proceeding before the agency amounted to a denial of procedural due process to petitioner. As sub-point (a) (pp 29-31) petitioner showed that the agency did not have jurisdiction to hold that the proposed structure was a "permitted use" and reverse the building commissioner (who had decided otherwise), because the application, notice and proceeding were on a different issue, namely an application for a variation. Petitioner (sub-point (b), pp 31-33) argued that the agency was a biased tribunal in that Hartnett, president of respondent club, was a member of the agency and participated actively in the hearings. Petitioner (sub-point (c), pp 33-35) argued that it was error for the agency to receive or consider evidence which was not presented at open hearing and as to which petitioner had no opportunity to inspect, consider and cross examine witnesses or offer evidence in explanation or rebuttal. Respondents make no answer to the point or to the sub-points.

(g) Petitioner (point **8**, pp 35-38) argued that the agency decision is based on a clear misconception of the law as to the construction of the applicable zoning regulation and showed that the decision insofar as it determined the front line of the subject parcel would be Lake Shore Drive, several hundred feet away to the east, instead of Chestnut Street on which the parcel abutted on the north and on which the exit and entrance of the proposed garage would open, was in clear violation of the applicable zoning regulation. Respondents make no answer.

(h) Petitioner (point **9**, pp. 38-42) argued that on this record to deprive petitioner of judicial review would be a violation of substantive due process, citing some of the leading cases from this Court, and other texts and authorities. Respondents make no answer.

(i) Petitioner (point **10**, pp 42-45) argued that the appeals opinion holding that petitioner cannot sue here to prevent what the building commissioner has determined to be a zoning violation because there is no violation (since the agency has decided the structure is a permitted use) is begging the question because the agency decision is not "final" but is subject to judicial review. Respondents make no answer.

(j) Petitioner (point **11**, pp 44-46) argued that the appeals opinion in stating that as a result of state court decisions, petitioner has no right of action in a federal court for injunction under 73-9, misconceives the condition of the state law and overlooks (i) the fact that the state supreme court has recognized not only the substantive right as given by 73-9 but the remedy of injunction and has enforced the provision for attorney's fees and (ii) the well established rule that federal courts in apply-

ing equitable relief to substantive rights are not bound by state court decisions as to these remedies, citing *Guaranty Trust Company* v. *York* (1945), 326 U.S. 99. Respondents make no answer.

Reply to Respondents' Argument.

1. The Case Is within the Jurisdiction of this Court.

Respondents state (p 7) "(1) *No federal question is involved.*" This statement is refuted by the record. There are three federal questions involved: (1) A question of federal procedure as to the application of Rule 12(b) prohibiting the consideration of an affirmative defense on defendant's motion to dismiss a complaint. (2) A question of "procedural due process" as to whether an agency decision is legal and valid when: (i) the agency included an officer of respondents, who participated actively in the agency hearings, (ii) the agency decision was on an issue which was not set up in the application, the notice and the scope of the agency hearing, (iii) the agency after the closing of proofs received and considered evidence outside of petitioner's presence, without petitioner having an opportunity to consider, cross examine or rebut. (3) A question of "substantive due process" in that the appeals opinion here has held in substance that the agency decision here is not subject to *any* judicial review.

Petitioner points out again that the effect of the previous state court litigation is that there has been *no judicial review* of this agency decision. It is true that the lower state court judgment purported review and affirm the agency decision; but the state supreme court in holding that petitioner lacked sufficient "standing" to bring state administrative review and in declining to consider the merits or any other issue, held, in substance that the lower court should have declined to hear the

case at all, and consequently the lower court judgment was erroneous so far as it attempted to pass upon the merits and should have confined itself to a dismissal of the suit. It is a well established principle that if a judgment of a lower court, entered on grounds *a* and *b*, is affirmed by the reviewing court on ground *b* alone, that the effect of the judgment as *res judicata* or otherwise is confined to ground *b*. American Law Institute Restatement of the Law of Judgments, p 316, sec 69(b) The affirmance of the state lower court on the ground of lack of standing of petitioner to bring state statutory administrative review is *res judicata* on that issue and that issue alone.

Respondents (pp 7-9) quote at some length from the opinion of the appeals court in the instant case, which opinion has been set out in full as Appendix A to the Petition. Petitioner submits that the issue here is not what the appeals court said, but whether what it said was correct as a matter of law, and that for the reasons given in the petition (and which reasons respondents do not answer) the appeals opinion is in error. Respondents (p 9) repeat the argument that in order for petitioner to recover, it was necessary to show some special damage to petitioner. This point has been dealt with in the petition herein, (pp 41-45) where it has been shown that while the state supreme court has held that "special damage" is a condition precedent to bringing state statutory administrative review, it has not held that special damage is a condition precedent to bringing suit for injunction under 73-9, and 73-9 contains no such requirement; in fact the state supreme court has apparently recognized not only the substantive right as given by 73-9 but the remedy of injunction and has also enforced the provision for attorney's fees, *Pasfield* v. *Donovan* (1956) 7 Ill. 2d 563. Petitioner (pp 44-46) has commented

on the case cited by the appeals court and respondents, *222 East Chestnut Street Corporation* v. *LaSalle National Bank* (1957) 15 Ill. App. 2d 460, 463 and has argued that the case is not persuasive here, for the reason among others, that that case was not heard on the pleadings but on the evidence, and that while after a final hearing on the evidence, the court may have equitable discretion to grant or not grant an injunction, this does not mean that injunction would never be granted or that the complaint be dismissed on a pleading motion. Petitioner has also pointed out (p 45) that this Court has held in *Guaranty Trust Co.* v. *York* (1945) 326 U.S. 99 that where a substantive right is created under state law, the federal courts in enforcing that right will not be bound by state precedents. Respondents make no answer.

Respondents (p 10) cite the action of this Court in denying certiorari on October 13, 1958 in another case, *222 East Chestnut Street Corporation* v. *LaSalle National Bank*, 253 F. 2d 455 (CA 7, 1958). This case did not involve the same issues as the instant case, particularly the absence of procedural due process and substantive due process. Further this Court has stated repeatedly that the denial of certiorari does not constitute any precedent from this Court. *Sunal* v. *Large*, 332 U.S. 174.

Respondents (p 10) argue that petitioner's contention that it has been deprived of "due process" arose for the first time in the proceedings before the court of appeals, after submission but before decision. The conclusive reply to this is that the district court had decided the case on the narrow issue of a motion to dismiss because of *supposed* lack of allegations of jurisdictional amount and *res judicata*, but had not given any consideration to the affirmative defense in bar of the agency decision set out in defendants' affidavit. Petitioner in its brief and argument before the court of appeals had naturally con-

fined itself to these grounds and had shown that neither ground was a basis in law for the district court action. When on oral argument before the court of appeals, it was disclosed to petitioner's counsel that the appeal judges (although inclined to agree with petitioner's counsel that the two grounds given by the district judge were without basis) were nevertheless inclined to affirm on another ground not considered by the district judge, namely the affirmative defense in bar of the agency decision, petitioner's counsel set this up in an affidavit **SA 1**, pp 33-37 and in a subsequent affidavit **SA 2**, pp 2-4, and moved the appeals court for leave to file instanter a tendered Amendment to Complaint, setting up matters of fact which as a matter of law would make null and void the agency decision on which the appeals court in oral argument had placed reliance (and which agency decision later on proved to be the basis of the appeals opinion.) There is therefore no merit in respondents' argument that petitioner should have tendered this proposed Amendment earlier either to the appeals court or to the district court, because up to the time of the oral argument in the appeals court petitioner had *reasonably* relied on the fact that the district court had granted the motion to dismiss on the two grounds of lack of jurisdictional averment and *res judicata*, without consideration of the agency decision, and that these two grounds were the only issues in the appeal. As soon as petitioner on the oral argument before the appeals court had ascertained that the appeals judges were inclined to consider the agency decision as a defense in bar, petitioner, thus taken by surprise, made a timely motion **(SA 1)** *before* the appeals opinion was handed down, moving for leave to amend and tendering its proposed Amendment. Petitioner's position has been and is on this issue that the agency decision as an affirmative de-

fense in bar is precluded by rule 12(b) from consideration on a motion to dismiss; but if, contrary to what seems to be the clear language of the rule, the appeals court is going to hold the agency decision to be open for consideration, then the court should allow the opposing party to raise the issue by proper pleading and make the necessary showing that the agency decision was illegal and null and void for the reason, among others, of violation of procedural due process and violation of substantive due process. Respondents (p 11) repeat their contention that the decision below did not involve any federal question; petitioner has shown that at least three federal questions were involved.

Respondents (p 11) cite *Durley* v. *Mayo*, 351 U.S. 277 (1956), *Stembridge* v. *Georgia*, 343 U.S. 541 (1952). Each of these cases was certiorari to a state supreme court and in each case this Court dismissed on the ground that there was no showing that the judgment of the state court might not have rested on some adequate non-federal ground. Respondents (p 11) also cite *Angel* v. *Bullington*, 330 U.S. 183 (1947). This Court there held that in a suit by plaintiff for a deficiency judgment on a mortgage, a judgment of the highest state court was *res judicata* on a new suit in the federal district court seeking the *same* relief against the *same* defendants on the *same* claim. Obviously the instant case does not come in that category for the reason, among others, that the relief sought in the present suit is essentially different from that sought in the state court suit (statutory administrative review) and the holding of the state supreme court that petitioner lacked "standing" to bring statutory administrative review because absent special damage, is no bar to the instant suit where petitioner's statutorily conferred substantive right does not require as a condition precedent any showing of special damage.

Respondents (p 12) argue that under the provisions of rule 12(b) the court is empowered to consider matters "outside the pleading." Respondents cite no authority for this extraordinary statement. Petitioner (Point 1 pp 15, 16) has shown that under 12(b) (as amended in 1946 and now worded) "extra-pleading" matters are precluded from consideration on a motion to dismiss and that while the district court has the right to treat such "extra-pleading" matters as the basis for a motion for summary judgment, it is requisite that the district court make such an election and give the opposing party an opportunity to file counter affidavits; that this was not done in the instant case and that the district judge disposed of the matter as a motion to dismiss. Respondents make no answer to this argument. The cases respondents cite on p 13 do not deal with the issue. Respondents have made no attempt to analyze these cases and petitioner will not extend this Reply by analyzing them except to state that they are all, on the facts, easily distinguishable from the instant case. For example, *Florasynth Laboratories* v. *Goldberg* (CA 7, 1951), 191 F. 2d 877 and *W. E. Hedger Transportation Corporation* v. *Bushey and Sons* (CA 2, 1951), 186 F. 2d 236, were both cases where the defense of *res judicata* was allowed to be raised by motion because the previous judgment was a judgment of the *same court*, of which that court naturally took judicial notice.

2. Contrary to respondents' contention (p 11), there is a case or controversy between the parties to this action. The whole basis of the appeals opinion is that the agency decision converted conduct that would *otherwise* have been a zoning violation, into a "permitted use," and therefore precluded any action under 73-9; that the

sole remedy of petitioner, or any other objecting property owner, was a suit for state statutory administrative review and that when the state supreme court held that petitioner *absent* special damage, lacked standing to bring such a suit, that that meant that petitioner had no right to judicial review whatever. Petitioner has argued (point 9 pp 38-42) that in a case like the instant one where the agency's decision was not of a *legislative* character (such as granting a variation) but of a *judicial* character (such as holding the structure to be a permitted use), that the due process provision of the United States Constitution requires that somewhere petitioner have a right to judicial review of this *judicial* agency decision, and that lacking any right to state statutory administrative review, petitioner can have recourse to the historic remedy of a suit for injunction. Petitioner has cited several cases from this Court so holding. Respondent makes no answer.

Petitioner also contended (point 7 pp 29-35) that even if it were the law that the agency decision were immune to any judicial review, that this would pre-suppose an agency decision in conformity with procedural due process and that where, as in the instant case, the agency decision violated procedural due process (respondent's president a participating member of the agency, lack of proper application, notice, etc. of hearings on the issue of permitted use, post-hearing secret consideration by agency of evidence without petitioner having a right to meet it) that this would render the decision null and void. Petitioner has cited authorities on this point; respondents make no answer.

II. This Court should review the case because the decision of the court of appeals if allowed to stand, will sanction a clear violation of both procedural due process and substantive due process.

1. The federal questions were raised below by petitioner. Respondents state (p 11) that petitioner is now for the first time arguing the proposition that matters outside of the pleadings may not be considered, that (p. 12) petitioner did not contest before the court of appeals the court's right to consider these matters. Respondents' statements are refuted by the record. With the Motion of petitioner filed with the court of appeals on April 25, 1958 **S.A. 1**, petitioner's counsel filed an affidavit in which it was set up (pp 35-36) that the agency decision was illegal and null and void because of the matters set out in said proposed Amendment, specifying the lack of procedural due process. In **S.A. 2**, the motion of petitioner to amend its motion filed on April 25, 1958, petitioner's counsel filed an affidavit therein reading in part as follows, **S.A. 2**, p 3:

> "Without in any way receding from plaintiff's position (a) that the zoning board decision was not included as a ground of the motion to strike, and (b) being an affirmative defense could not have been so included, affiant on further consideration and reflection (because of the importance of the issues here and the desirability of having the case determined on its merits and not on any technical point of procedure) has deemed it advisable to prepare and present a Motion, so filed on April 25, 1958, in which affiant recites a history of the aforesaid zoning decision, and in which affiant shows that said zoning board decision should properly be no defense to the present suit because first insofar as the decision attempts to rely on a 'permitted use,' it was illegal and invalid, etc."

2. The decision of the court of appeals is in conflict with the decisions of the courts of appeals, in three other circuits, namely District of Columbia, the Sixth and the Fifth.

Respondents (p 14) state that the rules "nowhere expressly prohibit the raising of affirmative defenses by a motion to dismiss." This statement is refuted by the history and present wording of rule 12(b), which provides that except for certain defenses therein stated, every defense "shall be asserted in the responsive pleading thereto, if one is required." It is true that among the defenses that may at the option of the pleader be made by motion, is "(6) failure to state a claim upon which relief can be granted." This obviously means the failure of the complaint *qua* complaint to state such a claim and it is admitted by respondents here (petitioner's point **2a** pp 16-17 that the complaint here does state a good cause of action. It is true that 12(b) provides further that if on a motion asserting defense (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Petitioner points out again that the district court never gave any indication that he was going to treat this motion to dismiss, as a motion for summary judgment and of course never gave petitioner an opportunity to file counter affidavits, that the district court order expressly recited that it was the *motion to dismiss* that was granted. Clearly on this condition of the record, there was no notice to petitioner that the motion was to be so considered, and petitioner was under no duty to file such a counter affidavit.

Respondents (p 15) state "Granting for the sake of argument that some of the defenses raised by motion in the instant case are affirmative defenses, still respondents had the right to elect to present these defenses by motion (Rule 12(b) Federal Rules of Civil Procedure)." No authority is cited for this statement. Respondents (p 15) state, "The fact that the defense of *res judicata* was supported in part by matters outside the record, none of which were controverted does not preclude its consideration." Petitioner points out again that while the district court put its order on the basis of *res judicata*, that this basis was without merit (petition **4(a)** 2d, pp 23-24) and that the Appeals' opinion expressly refrained from putting its decision on *res judicata* but, *put its affirmance* on the ground of the impregnability of the agency decision (saying, p 7a) "It is our duty to affirm if the decision below is correct although the lower court might have relied upon a different ground or reason."

Respondents (p 15) comment on *Sardo* v. *McGrath* (D.C. Cir. 1952), 196 F 2d 20, 23; *Herron* v. *Herron* (CA 5, 1958) 255 F 2d 589 and *Bowdidge* v. *Lehman* (CA 6, 1958) 252 F 2d 366 cited by petitioner. Respondents failed to meet the point raised by petitioner that in each of these cases the court of appeals held that before the district court had the right as a *summary judgment order* to dismiss plaintiff's action, it was necessary that plaintiff be given notice that such an order was under consideration by the court so that plaintiff could have "reasonable opportunity to present all material made pertinent to such a motion by Rule 56", and that in each of the cases, the dismissal by the district court was reversed.

Respondents (p 16) state "Respondents grant that if matters outside the pleadings are considered on a motion

based, as theirs is in part, on plaintiff's failure to state a claim upon which relief could be granted, the motion is to be treated as one for summary judgment. In a word, respondents agree that genuine issues of material fact may not be resolved by affidavits." Petitioner points out again: petitioner's complaint admittedly stated a cause of action; respondents' motion was not a motion for summary judgment but a motion to dismiss and under Rule 12(b) before it could be disposed of as a motion for summary judgment, petitioner should have had an opportunity "to present all material matter pertinent to such a motion by Rule 56." Respondents (p 16) repeat their erroneous statement "there are no facts in dispute" overlooking that if the motion were to be treated as one for summary judgment and the agency decision were to be available for consideration, that petitioner would have the right to present "all material made pertinent to such a motion," namely the material on the different issues set out in the tendered Amendment to Complaint, that because the agency included as participating member respondents' president, because the application, notice etc. before the agency were not pertinent to the agency decision, because the agency after the close of the hearings considered evidence offered by respondents without petitioner having a chance to meet same, *that there was a lack of procedural due process and the agency decision was null and void.*

CONCLUSION.

Respondents (p 17) repeat their statement that there is no federal question involved, ignoring the showing made by petitioner that there are at least three federal questions involved: (1) The proper construction of Rule 12(b), (2) the violation of "procedural due process", and (3) the violation of "substantive due process", and that the appeals' opinion makes no reference to any of these federal questions. Petitioner submits that all three of these questions are important in federal jurisprudence; that in addition, the judgment here, based upon an agency decision in which the respondents' president was an active participating member, where the case was noticed and heard on one issue and decided on an entirely different issue, where the agency after closing of proofs received and considered evidence which petitioner had no chance to meet, where the decision on its face shows such a complete disregard of the applicable zoning application as to be inexplicable on any other basis than the connection of respondents' president with the agency—are so shocking that this Court should exercise its "power of supervision" and grant a review. If the matters of fact set up in the proposed Amendment to complaint are true, there has been a flagrant denial of justice in this case. On the instant motion of defendants to dismiss, Rule 12(b) should be followed and the agency decision, an affirmative defense, excluded from consideration; but if the decision be held available for consideration, then certainly petitioner should be given an opportunity to plead and prove the matters alleged in the tendered Amendment showing that that decision was illegal and

void. If respondents are given leave to aver "extra-pleading" matters, surely petitioner should be given leave to meet these matters.

Administrative agencies have assumed an ever-increasing application and importance in American life. It is vitally necessary that such agencies proceed within the framework required by due process of law. *St. Joseph Stock Yards* v. *U. S.* (1936) 298 U.S. 38, 52, cited petition pp 38-39.

Petitioner renews its request that the petition for certiorari be granted.

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